

## CHAPTER 4

# THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR* TO MEDICAL NEGLIGENCE CASES IN THE UNITED STATES OF AMERICA

### 4.1 INTRODUCTION

In some instances the facts and circumstances accompanying an injury may be of such a nature as to permit an inference of negligence on the part of the defendant.

By applying the doctrine of *res ipsa loquitur* the jury is permitted to draw an inference of negligence from the occurrence itself if the instrumentality which caused the injury was under the management and control of the defendant at the time, and the occurrence was such as in the ordinary course of things would not happen unless those who had its management and control, exercised proper care. If the plaintiff under such circumstances did not himself contribute to the injury and in the absence of an acceptable explanation by the defendant, the accident itself affords sufficient evidence that the injury was probably caused by want of proper care. In medical

context the real question is generally whether or not during the course of the medical intervention, an extraordinary incident or unusual event occurred which could be regarded as falling outside the scope of the routine professional activity in the performance of such an intervention, which if left unexplained, would in itself reasonably indicate to the reasonable man it was the likely cause or causes of the injury <sup>1</sup>.

Generally speaking, the application of the doctrine of *res ipsa loquitur* is designed to alleviate the plaintiff's burden of proof by facilitating proof in circumstances where the plaintiff is unable to provide direct evidence of specific acts or omissions which may constitute negligence but where the accident itself according to common experience, bespeaks negligence. With

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<sup>1</sup> The court in **Sanders v Smith 200 Miss 551 27 So2d 889 (1946)** said the following in this regard: "...we think, that the test, generally, is not that the result of the operation was unusual and unexpected, or even fatal, alone and by itself, because, without an abnormal and rare end to operation, there would not exist an occasion for an action in damages from it. The real question, generally, is whether or not in the process of the operation any extraordinary incident or unusual event, outside of the routine of the action of its performance, occurred, and beyond the regular scope of its customary professional activity in such operations, which, if unexplained, would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequence. If there were such extraneous interventions, then the doctrine of *res ipsa loquitur* would be applicable to call upon the defendant to explain the matter, by evidence of exculpation, if he could. The jury would then decide the issue of fact in the case".

reference to medical malpractice cases Harney expresses the following opinion:

“In malpractice cases, the doctrine has experienced a highly controversial development. The medical profession has proposed legislation calling for the elimination of *res ipsa loquitur* entirely in actions against physicians. Legal scholars argue that, rather than facilitating a more precise judgment, the application of *res ipsa loquitur* in malpractice actions has resulted in legal uncertainties”<sup>2</sup>.

In this chapter the origin and development of the doctrine is also traced and the general requirements for the application of the doctrine, the nature and effect of the application of the doctrine on the *onus* of proof and the nature of the defendant’s explanation in rebuttal are expounded. A detailed discussion of the application of the doctrine to medical negligence cases in particular follows, with reference to case law and legal opinion. An overview of such commentaries is also provided. This chapter is concluded with a synopsis of the relevant legal principles which are applied when the doctrine is invoked generally and to medical negligence cases in particular.

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<sup>2</sup> Harney 429.

## 4.2 THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN THE UNITED STATES OF AMERICA

Although the doctrine seems to have been used as early as 1614 where a usuary was apparent on the face of an instrument it would appear that its *fons et origo* in the USA is also the case of **Byrne v Boadle** <sup>3</sup>.

As in England it also seems as if the exposition of the doctrine by Erle CJ in **Scott v London and St Katherine's Dock Co** is widely regarded as the first statement of the principle <sup>4</sup>. In its inception the doctrine was regarded as nothing more than a reasonable conclusion derived from the circumstances of an unusual accident, that it was probably the defendant's fault.

Prosser and Keeton say that the aftermath of the decision in **Christie v Griggs** to the effect that in cases of injuries to passengers at the hands of carriers, the carrier had the burden of proving that it had not been negligent, became confused and intermingled with the doctrine of *res ipsa loquitur*

<sup>3</sup> Prosser "The Procedural Effect of *Res Ipsa Loquitur*" 1936 *Minn L Rev* 241; Prosser and Keeton on *The Law of Torts* (1984) 243.

<sup>4</sup> **supra** 601.

and from this fusion there developed an uncertain doctrine which has through the years been the source of considerable trouble to the courts <sup>5</sup>. Despite severe criticism <sup>6</sup> the doctrine is applied in most of the states in the USA to a wide variety of situations and it's range is as broad as the possible events which justify its invocation <sup>7</sup>.

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<sup>5</sup> **Christie v Griggs supra 79**; Prosser and Keeton 243.

<sup>6</sup> See for example Bond CJ in **Potomac Edison Co v Johnson 160 Md 33 152 A 633 (1930)**: "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule".

<sup>7</sup> See for example: **Edgerton v New York & Hartford Railroad Co 39 NY 227 (1868)** (derailment); **Griffen v Manice 166 NY 188 59 NE 925 (1901)** (falling elevator); **Pillars v RJ Reynolds Tobacco Co 117 Miss 490 500 78 So 365 366 (1918)** (human toe in plug of chewing tobacco); **Shoshone Coca-Cola Bottling Co v Dolinski 82 Nev 439 420 P2d 855 (1966)** (mouse in squirt); **Gilbert v Korvette Inc 457 Pa 602 327 A2d 94 (1974)** (child's foot caught in escalator); **Horowitz v Kevah Konner Inc 67 AD2d 38 414 NYS2d 540 (1979)** (chartered bus left snowy throughway and turned over); **Carter v Liberty Equipment Co Inc 611 SW2d 311 (Mo App 1980)** (air compressor crashed through store window and hit employee); **Payless Discount Centers Inc v 25-29 North Broadway Corp 83 AD2d 960 433 NYS2d 21 (1981)** (sprinkler system in ceiling collapsed); **McWhorter v City of New Smyrna Beach Utilities Commission 400 So2d 23 (Fla App 1981)** (sewer blockage in city's sewer line); **Emerick v Raleigh Hills Hospital - Newport Beach 133 3d 575 184 Cal Rptr 92 (Cal App 1982)** (bathroom sink in hospital); **Watzig v Tobin 292 Or 645 642 P2d 651 (1982)** (motorist struck cow on highway); **Cangelosi v Our Lady of the Lake Regional Medical Center supra 654** (fracture of two cartilage rings in trachea during gall-bladder surgery).

## **4.3 REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE**

### **4.3.1 INTRODUCTION**

In the USA the following basic requirements must be met to enable a plaintiff to rely on the doctrine successfully:

- a. The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;**
- b. the accident must be caused by an agency or instrumentality within the exclusive control of the defendant;**
- c. the accident must not have been due to any voluntary action or contribution on the part of the plaintiff <sup>8</sup>.**

In some jurisdictions a controversial fourth condition to the effect that the **evidence as to the true explanation of the event must be more accessible**

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<sup>8</sup> Prosser 1936 *Minn L Rev* 241 242; Prosser and Keeton 244 suggest that these requirements were originally derived from the first edition of Wigmore on Evidence, § 2509 published in 1905. See also: Ficarra *Surgical and Allied Malpractice* (1968) 148; Morris and Moritz *Doctor and Patient and The Law* (1971) 403; De Lousanoff 21; Kramer and Kramer *Medical Malpractice* (1983) 88; Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 213; Harney 430; Boumil and Elias *The Law of Medical Liability in a Nutshell* (1995) 55-56; Healy 195.

to the defendant than to the plaintiff , is required <sup>9</sup>.

#### 4.3.2 NEGLIGENCE

The occurrence must be of a kind which ordinarily does not occur in the absence of someone's negligence <sup>10</sup>. The applicability of the doctrine therefore depends on whether in the light of ordinary (common) experience the accident was the result of the defendant's negligence <sup>11</sup>. The evidence required in order for the doctrine to be invoked must be such that reasonable persons can say that it is more likely that there was negligence associated with the cause of the accident than that there was not <sup>12</sup>.

#### 4.3.3 CONTROL

The accident must be caused by an agency or instrumentality within the

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<sup>9</sup> See for example: **Buckelew v Grossbard 87 NJ 512 435 A2d 1150 1157 (1981)**; **Strick v Stutsman 633 SW2d 148 (Mo App 1982)**; Prosser and Keeton 254.

<sup>10</sup> Prosser and Keeton 244; Giesen 516; Harney 430. See for example: **Seneris v Haas 45 Cal2d 811 291 P2d 915 (1955)**; **Frost v Des Moines Still College of Osteopathy and Surgery 248 Iowa 294 79 NW2d 306 (1956)**; **Fehrman v Smirl 20 Wis2d 1 121 NW2d 255 (1963)**.

<sup>11</sup> Prosser and Keeton 247.

<sup>12</sup> **Marathon Oil Co v Sterner Tex 632 SW2d 571 (1982)**; **Markarian v Pagano 87 AD2d 729 499 NYS2d 335 (1982)**; **Smith v Little 626 SW2d 906 907 (Tex Ct of App 1981)**; Prosser and Keeton 248.

control of the defendant. Traditionally, the plaintiff had to prove that the defendant was in exclusive control of the instrumentality which caused the injury<sup>13</sup>.

In **Watzig v Tobin**<sup>14</sup> the court stated that if exclusive control or custody is not required and if the plaintiff's voluntary participation does not prohibit its application, *res ipsa loquitur* would seem to require nothing more than evidence from which it could be established that the event was of a kind which does not normally occur in the absence of negligence and that the negligence which caused the event was probably that of the defendant.

This approach has been accepted by a number of courts and Prosser and

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<sup>13</sup> See for example **Bjornson v Saccone 6.11 88 (1<sup>st</sup> Dist Ill App 1899)**; This requirement is phrased differently in the Restatement of Torts (second) as follows: "the indicated negligence is within the scope of the defendant's duty to the plaintiff" and comment (g) to this section also states: "Exclusive control is merely one fact which establishes the responsibility of the defendant and if it can be established otherwise, exclusive control is not essential to a *res ipsa loquitur* case" (§ 328 D (1965)).

<sup>14</sup> **supra 655**. See also: **Payless Discount Centers Inc v 25-29 North Broadway Corp, supra 22**; **Parrillo v Giroux Co Inc\_RI\_426 A2d 1313 (1981)**; Prosser and Keeton 251; Giesen 516; Harney 430.



Keeton suggest that it would be far better if the control test were discarded altogether so that the requirement is that the negligent act complained of should be of such a nature that the defendant would more likely than not, be responsible for it <sup>15</sup>.

In the case of multiple defendants and unless there is vicarious liability or shared control the plaintiff does not succeed in making out a preponderant case against either of two defendants by merely showing that the plaintiff has been injured by the negligence of one or the other <sup>16</sup>. In both carrier and medical negligence cases the element of exclusivity has however been eroded to a great extent. Apart from these exceptions and certain other infrequent exceptions, *res ipsa loquitur* is still not applied against multiple defendants where it is inferable that only one has been negligent <sup>17</sup>.

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<sup>15</sup> Prosser and Keeton 251. See also for example: **Gilbert v Korvette Inc supra 94**.

<sup>16</sup> **Turner v North American Van Lines 287 SW2d 384 (Mo App 1956); Beakly v Houston Oil & Minerals Corp 600 SW2d 396 (Tex Civ App 1980); Fireman's Fund American Insurance Companies v Knobbe 93 Nev 201 562 P2d 825 (1977);** Prosser and Keeton 251; McCoid *Negligence Actions Against Multiple Defendants* 1955 *Stan L Rev* 480.

<sup>17</sup> See for example **Housel v Pacific Electric Railway Co 167 Cal 245 139 P 73 (1914); Ybarra v Spanguard supra 687; Anderson v Somberg 67 NJ 291 338 A2d 1 366 (1975); Dement v Olin-Mathiesen Chemical Corp 282 F2d 76 (5<sup>th</sup> Cir 1960); Becker v American Airlines Inc SDNY 200 F Supp 839 (1961);** Prosser and Keeton 253.

#### **4.3.4 CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF**

The third condition is that there must be an absence of any act on the part of the plaintiff contributing to the occurrence, its purpose being to insure that the plaintiff does not recover damages for injuries for which he himself is responsible<sup>18</sup>.

Since the advent of comparative negligence acts which serve to reduce the plaintiff's damages to the extent of his own negligence, this requirement has lost its logical basis unless the plaintiff's negligence appears to be the sole proximate cause of his injury<sup>19</sup>.

#### **4.3.5 EVIDENCE MORE ACCESSIBLE TO THE DEFENDANT**

Some courts require a controversial fourth condition to the effect that the

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<sup>18</sup> See for example: **Dugas v Coca-Cola Bottling Co 356 So2d 1054 (La App 1978)**; **Brantley v Stewart Building & Hardware Supplies Inc 274 Ark 555 626 SW2d 943 (1982)**; **Emerick v Raleigh Hills Hospital - Newport Beach supra 92**; **Watzig v Tobin supra 651**.

<sup>19</sup> Some states have discarded this requirement because of comparative negligence acts for example Oregon, Colorado and Wisconsin; Prosser and Keeton 254; Boumil and Elias 59.

true explanation of the accident must be more accessible to the defendant <sup>20</sup>. The underlying reason for this requirement may be to give the doctrine a greater procedural effect but it cannot be regarded as an indispensable requirement nor does it have any real importance in practice <sup>21</sup>.

#### 4.4 THE PROCEDURAL EFFECT OF THE APPLICATION OF THE DOCTRINE ON THE *ONUS* OF PROOF

##### 4.4.1 INTRODUCTION

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<sup>20</sup> See for example: **Buckelew v Grossbard supra 1157; Strick v Stutsman supra 148; Holman v Reliance Insurance Companies 414 So2d 1298 (La App 1982); Faby v Air France NY City Small Misc2d 840 449 NYS2d 1018 (CI 1982).**

<sup>21</sup> Prosser and Keeton 255. Prosser 1936 *Minn L Rev* 260 argues that there is no policy of law in favour of permitting a party who has the burden of proving in the first instance to obtain a directed verdict merely by showing that he knows less about the facts than his adversary. He also contends that this additional condition may have the result that sheer ignorance would become the most powerful weapon in the law. (Prosser “*Res Ipsa loquitur in California*” 1949 *Cal L Rev* 183 184; Jaffe “*Res Ipsa Loquitur Vindicated*” 1951 *Buff L Rev* 6-7 (contra) submits that although raw probabilities do not normally suffice to take a case to the jury it is fair to allow the case to go to the jury where the defendant is in a superior position to explain the accident. Ablin “*Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*” 1996 *Virginia L Rev* 325 331 opines that based on Prof Jaffe’s reasoning it follows that the defendant’s attempt to explain the occurrence should destroy a *res ipsa* inference, and the case should go to the jury only if there is enough circumstantial evidence to support a plaintiff’s verdict without the benefit of the doctrine.

In the USA as in England and South Africa, it appears that the doctrine is also considered to be a form of circumstantial evidence and thus forms part of the law of evidence. Under the circumstances it is necessary also to consider its nature and role in the law of evidence.

#### 4.4.2 *RES IPSA LOQUITUR* AND CIRCUMSTANTIAL EVIDENCE

Unless there are special circumstances applicable or a special relationship between the plaintiff and the defendant, the majority of courts in America regard the doctrine as a form of circumstantial evidence<sup>22</sup>. The application of the doctrine permits an inference of negligence against the defendant. In

**Sweeny v Erving** this inference theory was formulated as follows:

“[Res] ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forstall the verdict. Res ipsa

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<sup>22</sup> See for example: **National Tea Co v Gaylord Discount Department Stores Inc** 100 3d 806 56 Ill Dec 265 427 NE2d 345 (Ill App 1981); **Watzig v Tobin supra** 651. Prosser and Keeton 257. See also in general: Cleary *et al McCormick On Evidence* (1987) 967; Fishman *Jones on Evidence Civil and Criminal* (1992) 62; Chadburn *Wigmore On Evidence* (1995) 489ff; Carlson *et al Evidence: Teaching Materials For an Age of Science and Statutes* (1997) 181.

loquitur, where it applies, does not convert the Defendant's general issue into a affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff”<sup>23</sup>.

#### **4.5 ONUS OF PROOF**

Through the years the American courts have not been in harmony with regard to the procedural advantage that a plaintiff obtains against the defendant by invoking the doctrine against the defendant<sup>24</sup>. There appears to be three divergent approaches which have been adopted by the courts:

##### **4.5.1 THE PERMISSIBLE INFERENCE APPROACH**

The least effect which the successful application of the doctrine may have on the burden of proof is to permit the jury to infer from the plaintiff's case without other evidence that the defendant was negligent. The effect of the inference is to satisfy the burden which rests on the plaintiff to introduce evidence upon which reasonable men may find in his favour. The plaintiff

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<sup>23</sup> 228 US 233 33 416 571 Ed 815 (Sct 1913).

<sup>24</sup> Prosser and Keeton 257; De Lousanoff 57; Giesen 517.

will also on this basis escape a nonsuit or a dismissal, since there is enough evidence to go to the jury <sup>25</sup>.

The inference of negligence to be drawn from the circumstances is left to the jury who are permitted, but not compelled to find it. On this basis, and in most jurisdictions the burden is not shifted to the defendant nor an obligation to move forward with the evidence, except in the limited sense that if he fails to introduce evidence, he runs the risk that the jury may find against him <sup>26</sup>. In this regard it is important to note that many inferences may be possible but none of them may be so clear as to make the drawing of such an inference compulsory. On the inference approach and as a general proposition the strength of the inference to be drawn will be dependent on the specific circumstances of the case <sup>27</sup>.

#### **4.5.2 THE PRESUMPTION APPROACH**

A greater advantage is afforded to the plaintiff if a successful invocation of

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<sup>25</sup> Prosser 1936 243; **Buckelew v Grossbard supra 1150; Wilson v United States 645 F2d 728 (9<sup>th</sup> Cir 1981); Thomkins v Northwestern Union Trust Co Mont 645 P2d 402 (1982); De Lousanoff 51; Kramer and Kramer 89; Prosser and Keeton 258; Boumil and Elias 56.**

<sup>26</sup> **Rathvon v Columbia Pacific Airlines 30 193 633 P2d 122 (Wn App 1981); Estate of Neal v Friendship Manor Nursing Home 113 759 318 NW2d 594 (Mich App 1982).**

<sup>27</sup> **Watzig v Tobin supra 651.**

the doctrine is treated as creating a presumption. The effect of this approach means that the jury is not only permitted to infer negligence against the defendant but in the absence of exculpatory evidence by the defendant the court will require the jury to do so.

If the defendant in these circumstances rests his case without evidence the plaintiff will be entitled to a directed verdict. The burden of going forward with the evidence is cast on the defendant but it does not imply that the defendant is required to tender evidence of greater weight than that offered by the plaintiff. If the scales are evenly balanced when all the evidence is in, the verdict must be for the defendant <sup>28</sup>.

#### **4.5.3 THE SHIFTING OF THE BURDEN OF PROOF APPROACH**

The greatest effect afforded to the application of the doctrine is to shift the *onus* of proof to the defendant. This means that the defendant is required

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<sup>28</sup> **Newing v Cheatham 15 Cal3d 351 124 Cal Rptr 193 540 P2d 33 (1975); Hyder v Weilbaeher 54 287 283 SE2d 426 (Nc App 1981); Hammond v Scot Lad Foods Inc 436 NE2d 362 (Ind App 1982); De Lousanoff 54; Prosser and Keeton 258.**

to prove on the preponderance of the evidence that the injury was not caused by his negligence<sup>29</sup>. As the defendant will in some instances be unable to tender an explanation the imposition of such a burden would amount to a form of strict liability and cannot be supported on a general basis<sup>30</sup>. When the plaintiff is able to tender specific evidence of the defendant's negligence it is sometimes held that there is no room for inference or by attempting specific proof the plaintiff has waived the benefit of the doctrine. Although a plaintiff is bound by his own evidence, proof of some specific facts does not necessarily exclude inferences of others<sup>31</sup>. The principle appears to be that the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but does in fact not provide a full and complete explanation of the occurrence, does not destroy the inferences which are consistent with the evidence, and consequently does not deprive the plaintiff of the benefit of *res ipsa loquitur*<sup>32</sup>.

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<sup>29</sup> Prosser 1936 *Minn L Rev* 244; **Weiss v Axler 137 Colo 544 328 P2d 88 (1958)**; **Johnson v Coca-Cola Bottling Co 239 Miss 759 125 So2d 537 (1960)**; **Homes v Gamble 624 P2d 905 (Colo App 1980)**; **Toussant v Guice 414 So2d 850 (La App 1982)**; De Lousanoff 56.

<sup>30</sup> Prosser and Keeton 259

<sup>31</sup> *Ibid* 260.

<sup>32</sup> **Mobil Chemical Co v Bell Tex 517 SW2d 245 (1974)**; **Kranda v Houser-Norborg Medical Corp 419 NE2d 1024 (Ind App 1981)**; Prosser and Keeton 260.



#### **4.6 THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL**

The nature of the defendant's evidence in rebuttal is obviously dependent on whether the burden of proof is cast on the defendant or not. With the exception of a minority of jurisdictions it is generally agreed that the invocation of the doctrine does not cast the burden of proof on the defendant and on this basis the defendant is not obliged to tender any evidence and if he does, it need only permit the jury to say that it is as probable that he was not negligent than that he was <sup>33</sup>.

The inference of negligence drawn from the circumstances of the accident must be balanced against the defendant's evidence. The jury is not obliged to draw the inference and it only has weight while reasonable persons are able to derive it from facts in evidence <sup>34</sup>.

In order to get a directed verdict in his favour the defendant must tender

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<sup>33</sup> **Vonault v O'Rourke 97 Mont 92 33 P2d 535 (1934); Micek v Weaver-Jackson Co 12 2d 19 54 P2d 768 (Cal App 1936); Nopson v Wockner 40 Wn2d 645 245 P2d 1022 (1952); Kramer and Kramer 89; Prosser and Keeton 261; Giesen 517.**

<sup>34</sup> **Prooth v Wallsh 105 Misc2d 608 432 NYS2d 663 (Sup 1980); Prosser and Keeton 261; Boumil and Elias 62.**

evidence which will neutralize any reasonable inference of negligence contradict it to such an extent that reasonable persons can no longer accept it. The nature of the defendant's evidence to neutralize the inference is obviously dependent on the strength of the inference. A defendant who convincingly shows that the accident was caused by some outside agency over which the defendant had no control, that the occurrence commonly occurs without negligence on the part of anyone or that it could not have been avoided by the exercise of all reasonable care is entitled to a directed verdict in his favour<sup>35</sup>.

Where the defendant's evidence is to the effect that he exercised all reasonable care under the circumstances, it may not be sufficient to attract a directed verdict in his favour unless the proof of proper care is so overwhelming that it destroys the inference created by the invocation of the doctrine<sup>36</sup>.

#### 4.7 MEDICAL NEGLIGENCE CASES

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<sup>35</sup> **Oliver v Union Transfer Co 17 694 71 SW2d 478 (Tenn App 1934); Lopes v Narragansett Electric Co 102 RI 128 229 A2d 55 (1967); Wagner v Coca-Cola Bottling Co SD 319 NW2d 807 (1982); American Village Corp v Springfield Lumber and Building Supply 269 Or 41 522 P2d 891 (1974); Town of Reasnor v Pyland Construction Co 229 NW2d 269 (Iowa 1975); Strick v Stutsman supra 148; Prosser and Keeton 261.**

<sup>36</sup> **Prooth v Wallsh supra 663; Prosser and Keeton 262.**

#### 4.7.1 INTRODUCTION

As will appear from the case law *infra res ipsa loquitur* was initially not applied to medical negligence cases in the USA. Although there were various reasons for not applying the doctrine the requirement that the accident should not occur in the absence of negligence, provided the most important obstacle. Injuries in medical accidents may result from a variety of causal agents apart from the negligence of the defendant, for example the plaintiff's pre-existing medical condition.

The inherent high risk attached to certain medical interventions also often give rise to complications even though all reasonable care is exercised by the health care provider. The third reason for the reluctance to apply the doctrine to such cases was the fact that juries in medical actions would rarely be able to conclude that the injury was one that does not ordinarily occur in the absence of negligence, based on their common knowledge or common experience alone<sup>37</sup>.

On the other hand the failure to apply the doctrine to medical negligence

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<sup>37</sup> Ablin 1996 *Virginia L Rev* 332. See for example: **Hine v Fox 89 So2d 23 (Fla 1956)**; **Schockley v Payne 348 SW2d 775 (Tex Civ App 1961)**; **Lagerpusch v Lindley 253 Iowa 1033 115 NW2d 207 (1962)**.

cases would serve to increase the dilemma between the patient knowing nothing about the cause of the accident and the health care provider who ought to know or has access to the relevant facts <sup>38</sup>.

The standard of care used for evaluating conduct of the medical practitioner in a medical negligence case is usually established with expert medical evidence because the defendant's conduct is measured against a 'reasonable medical practitioner' standard and not a 'reasonable person' standard <sup>39</sup>. In this regard two problems present themselves. Firstly, the perceived reluctance among medical practitioners to testify against their colleagues and secondly, the plaintiff's inability to prove specific acts of negligence because of the fact that he is usually unconscious during treatment and therefore unable to determine the cause of his injury <sup>40</sup>.

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<sup>38</sup> Giesen 516.

<sup>39</sup> Podell "Application of *Res Ipsa Loquitur* in Medical Malpractice Litigation" 1977 *Ins Council J* 634; De Lousanoff 285. See also for example: **Wallstedt v Swedish Hosp 220 Minn 274 19 NW2d 426 (1945); Beane v Perley 99 NH 309 109 A2d 848 (1954); Fehrman v Smirl supra 225; Studton v Stadnix 469 P2d 16 (Wyo 1970).**

<sup>40</sup> Podell 1977 *Ins Council J* 634.

In **Salgo v Leland Stanford Jr Univ Bd of Trustees** the court appraised the historical development of the application of the doctrine to medical negligence cases as follows:

“The application of the doctrine of *res ipsa loquitur* in malpractice cases is a development of comparatively recent years. Before that time, the facts that medicine is not an exact science, that the human body is not susceptible to precise understanding, that the care required of a medical man is the degree of learning and skill common in his profession or locality, and that even with the greatest of care untoward results do occur in surgical and medical procedures, were considered paramount in determining whether the medical man in given circumstance had been negligent. But gradually the courts awoke to the so-called “conspiracy of silence”. No matter how lacking in skill or negligent the medical man might be, it was almost impossible to get other medical men to testify adversely to him in litigation based on his alleged negligence. Not only would the guilty person thereby escape from civil liability for the wrong he had done, but his professional colleagues would take no steps to ensure that the same results would not again occur at his hands. This fact, plus the fact that usually the patient is by reason of anesthesia or lack of medical knowledge in no position to know what occurred that resulted in harm to him, force the courts to attempt to equalize the situation by in some cases placing the burden on the doctor of explaining what occurred in order to overcome an inference of negligence. One other fact contributed to the application of the doctrine, namely, that certain medical and surgical procedures became so common that in many of them the laymen knew that if properly conducted untoward results did not occur, and in others medical men (when it was possible to get them to admit it) from their specialized knowledge knew that without negligence the result would have been a good one”<sup>41</sup>.

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<sup>41</sup> **supra** 170. See for example with regard to the so-called “conspiracy of silence”: Ficarra 58; De Lousanoff 58; Giesen 513; Belli *Ready for the Plaintiff* (1963) 91.

Other factors which contributed to the increased judicial willingness to apply the doctrine to medical negligence cases were recognition that the jury in a growing number of cases were capable of determining negligent conduct without the aid of expert testimony, that the actual facts were more often than not within the knowledge of the medical practitioner and that the special fiduciary relationship between the doctor and the patient demanded that the doctor be required to explain what transpired during the treatment <sup>42</sup>.

The courts have generally adhered to traditional requirements common to all negligence cases where the doctrine is applied and specifically limited the factual settings in medical context. As will be observed *infra*, the requirements of the doctrine has, as far as medical negligence is concerned, been modified to a certain extent but such modification must be considered as the natural growth of the doctrine and more particularly as a more natural employment of the doctrine through adaptation to a particular field of litigation <sup>43</sup>.

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<sup>42</sup> Podell 1977 *Ins Council J* 635; **Salgo v Leland Stanford Jr Univ Bd of Trustees** *supra* 170; **Ybarra v Spanguard** *supra* 687; **Klein v Arnold** 203 NYS2d 797 (Sup Ct 1960).

<sup>43</sup> Podell 1977 *Ins Council J* 636.

## **4.7.2 DOCTRINAL REQUIREMENTS IN MEDICAL CONTEXT**

### **4.7.3 INTRODUCTION**

In contra-distinction to the legal position in South Africa and England it appears that the courts in the USA have, to a certain extent modified the requirements for the application of the doctrine in medical negligence context. It is therefore necessary to consider such modifications in much more detail.

### **4.7.4 NEGLIGENCE IN MEDICAL CONTEXT**

The general test for evaluating this requirement is whether in the light of ordinary experience of the layperson it can be inferred as a matter of common knowledge that the defendant has been negligent. This requirement obviously has a limiting effect on the application of the doctrine to medical negligence cases since medical conduct has traditionally been the subject of medical experts and not the layperson. It is generally accepted that the non-expert is unable to draw inferences or evaluate medical issues without the assistance of an expert. For this reason the doctrine's application in medical context was initially confined to 'blatant blunder' or obvious cases

where ‘circumstances seemed more amenable to lay judgement than to a purely professional one’<sup>44</sup>.

Two rules influence the scope of the common knowledge requirement and are known as the ‘calculated risk’ and the ‘bad result’ rules, respectively. In terms of the ‘calculated risk’ rule, many courts have refused to apply the doctrine when the complications become a calculated or even expected risk of the intended medical procedure<sup>45</sup>.

In this regard the reasoning appears to be that as soon as the defendant has proven that an accepted method of treatment involves inherent or material risks to the patient, it becomes impossible for the judge or the jury to determine whether there was negligence or whether the injury was unavoidable, without the aid of expert medical testimony. The ‘calculated risk’ rule can accordingly be successfully utilized by the defendant if he can produce expert evidence or statistics showing that the accepted method of

<sup>44</sup> Weiler *Medical Malpractice on Trial* (1991) 22; Podell 1977 *Ins Council J* 636; Ablin 1996 *Virginia L Rev* 333. Examples of obvious cases are retained surgical products in the patient’s body or the erroneous amputation of a healthy limb.

<sup>45</sup> **Ayers v Perray 192 F2d 181 (3<sup>rd</sup> Cir NJ 1951), Silverson v Weber 57 834 22 Cal Rptr 337 372 P2d 97 (Cal App 1962)**. See also Comment, “*Res Ipsa Loquitur and the Calculated Risk in Medical Malpractice*” 1956 *So Cal L Rev* 80.



treatment he employed, involved substantial or material risks to the patient<sup>46</sup>.

The 'bad results' rule entails the principle that evidence of unsuccessful treatment or a 'bad result', without expert medical evidence, does not on its own constitute sufficient evidence to draw an inference of negligence<sup>47</sup>. More recent decisions are indicative of the approach that courts refuse to apply the 'bad results' rule. Yet proof of a bad result has even on occasion, by itself, been held sufficient, to justify the application of the doctrine on the basis that the 'bad result' would probably not have occurred without negligence<sup>48</sup>.

The growing recognition that more sophisticated medical matters fall within the common knowledge of laypersons and the willingness of certain courts to employ medical experts for determining the applicability of the doctrine, has resulted in an increased utilization of the doctrine in medical negligence

<sup>46</sup> **Engelking v Carlson 13 Cal2d 216 88 P2d 695 (1939); Farber v Olkon 40 Cal2d 503 254 P2d 520 525 (1953).**

<sup>47</sup> See for example: **Olson v Weitz 37 Wash 2d 70 221 P2d 537 (1950); Robinson v Wirts 387 Pa 291 127 A2d 706 (1956); Rhodes v DeHaan 184 473 337 P2d 1043 (1959); Terhune v Margaret Hague Maternity Hosp 63 NJ Super 106 164 P2d 75 (App Div 1960).**

<sup>48</sup> See for example: **Olson v Wirts supra 537; Cho v Kempler 177 2d 342 2Cal Rptr 167 (Cal App 1960).**

cases. Podell suggests that the increased application of the doctrine in this context derives from an increased ability to apply the negligence test, rather than to a relaxation of traditional doctrinal requirements<sup>49</sup>.

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<sup>49</sup> Podell 1977 *Ins Council J* 637. Ablin (1996 *Virginia L Rev* 333 contra) states that the relaxation of this requirement as well as certain courts' willingness to allow *res ipsa loquitur* together with expert medical evidence allow plaintiffs to introduce expert evidence as to the first prong of *res ipsa loquitur* and then rely upon *res ipsa loquitur* to reach the jury, even though the jury would have to credit and rely on the experts' knowledge, rather than its own, to infer negligence. De Lousanoff 39 points out that if expert testimony is necessary to show not only what was done, but how and why, one can hardly say the 'thing speaks for itself'. Epstein "*Medical Malpractice: Its Cause and Cure*" 1978 *The Economics of Medical Malpractice* 245, 251) opines that this relaxation "shifted the wavy line between inevitable accident and culpable conduct so that the injuries once regarded as inevitable are today regarded as actionable". A commentator in "*The Application of Res Ipsa Loquitur In Medical Malpractice Cases* 1966 *Northwestern University L Rev* 852, 874 says that although this relaxation may be justified on social policy and ensures that a negligently injured plaintiff may recover, the danger of this policy is that it may have the unfortunate consequence of imposing liability in an inconsistent and arbitrary fashion because jurors are left to decide the question of liability without a meaningful standard if their common knowledge is not sufficient to determine the issue of negligence. See also: **Seneris v Haas supra 915**; **Mayor v Dowsett 240 Or 196 400 P2d 234 (1965)**; **Harris v Cafritz Mem Hosp 346 2d 135 (DC App 1977)**; **Perin v Hayne 210 NW2d 609 (Iowa 1973)**; **Walker v Rumer 72 Ill 2d 495 381 NE2d 689 (1978)**; **Parks v Perry 68 202 314 SE2d 287 (NC App 1984)**.

A further liberalization of the doctrinal requirements for the application of the doctrine is that some courts allow the plaintiff to both introduce evidence of specific acts of negligence, and to rely on the doctrine which is analogous to the simultaneous use of expert evidence and *res ipsa loquitur* discussed supra. Courts have also allowed the plaintiff not just to avoid a nonsuit by applying the doctrine but also to request and receive a *res ipsa loquitur* jury instruction. In terms of this concession the plaintiff is able to avoid a nonsuit and to invite the jury to draw an inference of negligence against the defendant via the *res ipsa* instruction.

Ablin says the following in this regard:

“Although *res ipsa loquitur* was designed as a shield from nonsuit, employed in order for the plaintiff’s case to at least reach the jury, *res ipsa loquitur* is also now used as a sword: not only will the plaintiff’s case proceed to the jury, but the jury will be invited to draw an inference of negligence in the plaintiff’s favor via the *res ipsa loquitur* instruction. This offensive use of *res ipsa loquitur* truly appears to stack the deck in favor of medical malpractice plaintiffs, especially given a court’s and jury’s potential “hypnotic awe of the Latin words”, which are “treated as a special ritual fraught with mystery and magic”. The fact that plaintiffs rarely lose *res ipsa* cases that reach the jury suggests the power of extending an invitation to the jury to find for the plaintiff based on a Latin formula. Moreover, the issuance of a *res ipsa* jury instruction only further complicates the complex debate over the procedural effect of *res ipsa loquitur*” (footnotes omitted) <sup>50</sup>.

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<sup>50</sup> Ablin 1996 *Virginia L Rev* 335.

Ablin also refers to the case of **Daubert v Merrell Dow Pharmaceuticals 113 S Ct 2786 (1993)** where the Supreme Court ruled that the Federal Rules of Evidence superseded the stricter ‘general acceptance’ requirement for the admissibility of expert evidence so that a more liberal approach of admitting expert evidence is adopted wherever it will assist the trier of fact to understand the evidence or to determine a fact in issue. She says that this may have the effect that a plaintiff can now receive a *res ipsa loquitur* instruction and present a greater variety of expert evidence <sup>51</sup>.

#### **4.7.5 CONTROL IN MEDICAL CONTEXT**

This requirement does not create any unique problems of application in medical negligence cases where a patient is treated by a single medical practitioner. The problems arise in modern surgical settings where “a complex organization of highly specialised, independent and interrelating members of the surgical process and pre- and postoperative periods of care are involved” <sup>52</sup>.

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<sup>51</sup> Ablin 1996 *Virginia L Rev* 336.

<sup>52</sup> Podell 1977 *Ins Council J* 641.

The majority of jurisdictions support the approach that the doctrine does not find application to multiple defendants unless vicarious or joint liability can be shown because the doctrine must point to a particular defendant and not a group of defendants within which the negligent defendant may be found <sup>53</sup>.

#### **4.7.6 BASES FOR ALLOWING *RES IPSA LOQUITUR* AGAINST MULTIPLE MEDICAL DEFENDANTS**

#### **4.7.7 CONCURRENT CONTROL**

The courts have applied the doctrine of *res ipsa loquitur* to facts which indicate that the defendants had concurrently exercised control over medical instrumentalities <sup>54</sup>.

#### **4.7.8 *RESPONDEAT SUPERIOR***

Based on the principle of *respondeat superior* the courts have also allowed

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<sup>53</sup> McCoid 1955 *Stan L Rev* 480; Podell 1977 *Ins Council J* 642; De Lousanoff 41.

<sup>54</sup> Teshima “*Applicability of Res Ipsa Loquitur in Case of Multiple Medical Defendants-Modern Status*” 67 *ALR* 4<sup>th</sup> 544; **Matlick v Long Island Jewish Hospital** 25 2d 538 267 NYS2d 631 (2d Dept App Div 1966); **Fogal v Genesee Hospital** 41 2d 468 344 NYS2d 552 (4<sup>th</sup> Dept App Div 1973); **Shields v King** 40 2d 57 317 NE2d 77 69 Ohio Ops 2d 57 317 NE2d 922 (Ohio App 1973 Hamilton Co); **Kolakowski v Voirs** 83 Ill2d 388 47 Ill Dec 392 415 NE2d 397 (1980).

the application of the doctrine to multiple defendants in medical negligence cases<sup>55</sup>.

#### **4.7.9 THE ‘YBARRA’ RULE OF UNALLOCATED RESPONSIBILITY**

The most significant departure from the majority approach with regard to the application of the exclusive control requirement to medical negligence cases was initiated by the judgment in **Ybarra v Spanguard**<sup>56</sup>. In this action the plaintiff developed paralysis and atrophy around the muscles of his shoulder after undergoing an appendectomy. The plaintiff sued his own doctor who had arranged the operation, the doctor who performed the operation, the anaesthetist and two nurses employed by the hospital as well as the doctor who owned and managed the hospital. The plaintiff was unable to establish negligence in respect of any individual and the court entered a judgment of nonsuit in favour of all the defendants.

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<sup>55</sup> **Sherman v Hartman 137 2d 589 290 P2d 894 (1<sup>st</sup> Dist Cal App 1955); Frost v Des Moines Still College of Osteopathy & Surgery supra 306; Voss v Bridwell 188 Kan 643 364 P2d 955 (1961); Somerset v Hart 549 SW2d 814 (Ky 1977); See however (contra): Shutts v Siehl 109 145 10 Ohio Ops 2d 363 164 NE2d 443 (Ohio App 1959 Montgomery Co); Falcher v St. Luke’s Hospital Medical Center 19 247 506 P2d 287 (Ariz App 1973); Adams v Leidholt 195 Colo 450 579 P2d 618 (1978).**

<sup>56</sup> **supra 445.** See also Furrow *et al* 168ff.

On appeal the defendants argued that *res ipsa loquitur* could not be applied because, assuming that the patient's condition was caused by injury, there was no evidence to indicate that the act of any particular defendant nor any particular instrumentality caused the injury. The defendants also attacked the plaintiff's attempt to establish liability 'en masse' on various defendants some of whom were not responsible for the acts of others and also plaintiff's failure to indicate which defendants had control of the instrumentalities which may have caused the injury.

The court held that although it did not appear that any particular defendant had exclusive control or that it was more probable that the injury resulted from negligence on the part of each individual defendant, it relied on the defendants' superior knowledge and special relationship to apply the doctrine. The relevant portion of the judgement reads as follows:

“The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely no more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the

doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. (citation omitted) If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries in the course of treatment under anesthesia. But we think this juncture has not been reached, and that the doctrine of *res ipsa loquitur* is properly applicable to the case before us"<sup>57</sup>.

It should be noted that the court recognised the different relationships between the defendants *inter se* but refused to take the view that the number of relationships of the defendants determines whether the doctrine could be applied or not. The court pointed out that every defendant in whose custody the plaintiff was charged for any period was bound to exercise ordinary care to ensure that no harm came to the plaintiff. The court placed the burden of initial explanation on the defendants because it concluded that the control at one time or another, of one or more of the various instrumentalities or agencies which may have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants<sup>58</sup>.

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<sup>57</sup> **supra 689.**

<sup>58</sup> **supra 690.** See also: McCoid 1955 *Stan L Rev* 480; Prosser and Keeton 252; De Lousanoff 41; Giesen 524; Harney 430; McClellan *Medical Malpractice: Law, Tactics, and Ethics* (1994) 35; Boumil and Elias 57; Furrow *et al* 169; 253ff *infra*.



The judgment in **Ybarra** has given rise to severe criticism but is followed by quite a number of jurisdictions <sup>59</sup>.

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<sup>59</sup> Morris ““*Res Ipsa Loquitur*” *Liability Without Fault*” 1958 *Ins Council J* 97 103, says that the court was not applying *res ipsa loquitur* but a ‘rule of sympathy’ and warns against the extension of the doctrine to the point where an untoward result is the only required proof to require a defendant doctor to ‘run the gauntlet of judicial speculation, with disastrous consequences approaching financial ruin’. See also: Seavy, “*Res Ipsa Loquitur: Tabula in Neufragio* 1950 *Harv L Rev* 643, 648; Jaffe 1951 *Buff L Rev* 1 11; Adamson, “*Medical Malpractice: Misuse of Res Ipsa Loquitur* 1962 *Minn L Rev* 1043 1049. See however (pro) for example: Broder, “*Res Ipsa Loquitur In Medical Malpractice Cases*”, 1969 *DePaul L Rev* 421, 426; Podell opines as follows in this regard:

“The special responsibilities attending the doctor-patient relationship, especially pertinent to the surgical setting, justifies a continued adherence to the *Ybarra* view...Plaintiffs injured while unconscious during a surgical procedure are deprived of the very opportunity to obtain a medical expert unless the defendants reveal the facts. The *Ybarra* approach to the doctrine of *res ipsa loquitur*, then, can be viewed as a refusal by the courts to permit the extension of the ‘conspiracy of silence’ within the operating room where medical practitioners assume the highest degree of trust and responsibility towards the patient”. See also for example: **Oldis v La Societe Francaise de Bienfaisance Mutuelle** 130 2d 461 279 P2d 184 (1<sup>st</sup> Dist Cal App 1955); **Frost v Des Moines Still College of Osteopathy & Surgery** supra 306; **McCall v St Joseph’s Hospital** 184 Neb 1 165 NW2d 85; **Anderson v Somberg** supra 522; **McCann v Baton Rouge General Hospital** 276 So2d 259 (La 1973); **Jones v Harrisburg Polyclinic Hospital** 496 Pa 465 437 A2d 1134 (1981); **Swan v Tygett** 669 SW2d 590 (Mo App 1984); **Schaffner v Cumberland County Hospital System Inc** 77 NC App 689 336 SE2d 116 review den 316 NC 195 341 SE2d and review den 316 NC 195 341 SE2d 579 (1985); **Butti v Rollins** 133 2d 205 519 NYS2d 14 (2d Dept App Div 1987).

#### 4.7.10 CONDITIONAL *RES IPSA LOQUITUR*

Ordinarily, and in cases where it is not difficult to ascertain whether the doctrinal elements have been established the presiding judge decides as a matter of law whether the doctrine of *res ipsa loquitur* is applicable to a particular case. In such cases the judge either instructs the jury as to the procedural effect which follows or nonsuits the plaintiff or directs a verdict for the defendant.

In cases, however, where it is problematic to establish whether the doctrinal requirements have been met, and where reasonable minds may differ on that issue the court employs a so-called ‘conditional’ *res ipsa* instruction to the jury in terms of which it is first to determine if the facts justify the application of the doctrine to the case. If the jurors conclusion is in the affirmative they are then instructed as to the procedural effect of the application of the doctrine<sup>60</sup>.

In **Seneris v Haas** the plaintiff suffered paralysis of both legs consequent to spinal anaesthesia during delivery of her child. She instituted proceedings

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<sup>60</sup> De Lousanoff 48. See for example: **Quintal v Laurel Grove Hosp 62 Cal2d 154 41 Cal Rptr 577 397 P2d 161 (1964)**; **Tomei v Henning 67 Cal2d 319 62 Cal Rptr 9 431 P2d 633 (1967)** **Clark v Gibbons 66 Cal2d 399 58 Cal Rptr 125 (1967)**; **Schnear v Boldrey 99 Cal Rptr 404 22 CA3d 478 (1971)**.

against the obstetrician, the anaesthesiologist and the hospital. She was nonsuited at the trial and on appeal the Supreme Court reversed and held that where circumstances indicate a reasonable doubt as to whether a defendant's conduct falls within the parameters of ordinary care, such doubt must be resolved as a matter of fact rather than law <sup>61</sup>.

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<sup>61</sup> **supra 924**. In this regard the court found: "The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities". De Lousanoff 49ff opines that the underlying rationale for this rule is that where the court has doubt in borderline cases whether the plaintiff has sustained his burden of proof, he will still have his chance by letting his case reach the jury. He then expresses the following concern: "However, it seems very problematic to transfer that rule to the question of applicability of *res ipsa loquitur*, even if it helps the plaintiff in medical malpractice cases. It is very much unlikely that the jury is capable to make a clear distinction between the question of applicability of the doctrine and its procedural effect. On the contrary, it appears much more probable that the jury, instructed on a conditional *res ipsa loquitur*, will not only decide whether the doctrine applies but also conclude the issue of negligence... For these reasons, it would be recommendable to leave the determination whether *res ipsa loquitur* is applicable to a particular case entirely for the judge. If he has doubts whether the doctrine may properly be invoked *res ipsa loquitur* should be applied. According to the general rule in negligence cases it should be for the jury then to decide how strong is the implication of negligence. The distinction between a conditional and an unconditional *res ipsa loquitur* instruction implies an unnecessary risk of confusion among the jurors and appears very likely to be prejudicial for the outcome of the particular case". See also Trucco "*Conditional Res Ipsa Loquitur in Illinois Medical Malpractice Law: Proof of a Rare Occurrence as a Basis for Liability-Spidle v Steward*" 1981 *DePaul L Rev* 413.

#### 4.8 ABSENCE OF CONTRIBUTORY NEGLIGENCE IN MEDICAL CONTEXT

Where, in a medical negligence action the court finds that there is a possibility that the plaintiff behaved in such a manner as to contribute to his own injury the doctrine of *res ipsa loquitur* is not applied against the parties who administered the treatment <sup>62</sup>. The advent of comparative fault acts, converts the plaintiff's contributory fault from the traditional barring of liability to one of reducing damages to the *pro rata* degree of fault of the plaintiff <sup>63</sup>.

#### 4.9 EVIDENCE MUST BE MORE ACCESSIBLE IN MEDICAL CONTEXT

This controversial fourth requirement for the application of *res ipsa loquitur* has found limited application in medical context <sup>64</sup>.

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<sup>62</sup> See for example: **Hornbeck v Homeopathic Hospital Asso 57 Del 120 197 A2d 461 (Super 1964)**; **Kitto v Gilbert 39 374 70 P2d 544 (Colo App 1977)**; **Mayor v Dowsett supra 234**; **Holmes v Gamble 655 P2d 405 (Colo 1982)**; **Emerick v Raleigh Hills Hospital - Newport Beach supra 92**.

<sup>63</sup> See fn 18 supra.

<sup>64</sup> **Seneris v Haas supra 915**; In **Wells v Woman's Hospital Foundation 286 So2d 439 442 (La App 1973)** the court for example found: "This testimony stands unrefuted and thus the only other source of information to explain the presence in plaintiff's abdomen of an additional odioform gauze pad must lie in the hands of those responsible for the medical treatment of plaintiff at the time the gauze packing was supposed to have been removed".

#### 4.10 STATUTORY REGULATION OF THE DOCTRINE IN MEDICAL CONTEXT

State legislatures also have the authority to regulate the application of the doctrine of *res ipsa loquitur*. During the 1970's, and in response to an increasing number of medical negligence claims, many states enacted legislation for the purpose of reducing the number of malpractice claims. A number of these statutes limit or have abolished the application of the doctrine in, malpractice cases<sup>65</sup>.

The Alaska statute for example prevents a plaintiff from relying on the doctrine of *res ipsa loquitur* to reach the jury if no direct evidence of negligence is produced<sup>66</sup>. In Tennessee the applicable statute creates a rebuttable presumption of the defendant's negligence when the instrumentality is in the exclusive control of the defendant and the injury does not ordinarily occur in the absence of negligence<sup>67</sup>.

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<sup>65</sup> Eldridge "Torts – North Carolina expands the Application of Res Ipsa Loquitur in Medical Malpractice: Parks v Perry" 1986 Wake Forest L Rev 537 547.

<sup>66</sup> ALASKA STAT § 09. 55. 540 (b) (1983).

<sup>67</sup> Tenn Code Ann § 29-26-115 (c). See also for example: Cal Evidence Code § 646; NC gen Stat § 90-21.12 (1985); DEL CODE ANN tit 18, § 6853; (Cum Supp 1984); NEV REV STAT § 41a 100.

## **4.11 CASE LAW**

### **4.11.1 INTRODUCTION**

In the USA there is a plethora of reported authorities on the application of the doctrine to medical negligence cases and it is therefore possible to categorize such cases in medical context. To facilitate a comparative survey between the English and USA case law<sup>68</sup> and to keep the reference to USA case law within manageable bounds, the categorization follows the English headings in Chapter 3 supra. An attempt is also made to highlight the general trends reflected by these authorities and where possible also to allude to so-called landmark decisions on the subject.

### **4.11.2 RETAINED SURGICAL PRODUCTS**

The doctrine finds frequent application to so-called 'foreign object' cases where for example a surgical instrument is left behind in the patient. It is argued that a medical layman is competent enough to decide the negligence issue in such a factual setting without the aid of expert testimony.

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<sup>68</sup> Due to the dearth of reported authorities on the application of the doctrine to medical negligence cases in South Africa it is obviously not possible to categorize such authorities in a similar fashion.

In **Johnson v Ely**<sup>69</sup> the plaintiff instituted an action against Dr Ely alleging that he had left a needle in the plaintiff's abdomen during an appendectomy. The court found in favour of the defendant but on appeal the court *inter alia* found that if the needle entered through the incision during the operation and the wound was closed without removing it, the doctrine applies and in the absence of reasonable explanation the jury may infer negligence. It found that where the inferences of negligence which arise under the doctrine are rebutted by opposing evidence, the weight of the inference is for the jury to decide and in the absence of reasonable and successful explanation the jury may infer negligence.

The court further held that under *res ipsa loquitur*, where the inferences of negligence are rebutted by opposing evidence, the weight of the inference is for the jury unless uncontradicted explanatory evidence excludes the inference that the injury arose from want of ordinary care. Explanations showing that the injuries might have occurred from some other cause not attributable to the defendant's negligence is not sufficient to take the case to the jury<sup>70</sup>.

The plaintiff in **Wells v Woman's Hospital Foundation**<sup>71</sup> alleged that she

<sup>69</sup> 30 294 205 SW2d 759 (Tenn App 1947).

<sup>70</sup> See also **Bowers v Olsch** 260 P2d 997 (1953) (leaving of a needle in the abdomen, *res ipsa loquitur* applied. See however **Anderson v Somberg** *infra* where a different approach was adopted.

<sup>71</sup> *supra* 439.

suffered damages because of a retained gauze pad inside her abdomen following treatment for an infected abdominal incision. The court found in favour of the defendant and on appeal it was held that the doctrine of *res ipsa loquitur* was applicable to the action, that the plaintiff was not contributory negligent, that the state was vicariously liable to the plaintiff under the doctrine of *respondeat superior* and that there was no abuse of discretion. With regard to the doctrine of *res ipsa loquitur* the court stated that the untoward or unusual event was not the placement of the odioform gauze pad inside the plaintiff but the failure of the attending doctor or doctors to remove it, before discharging the plaintiff. The Court of Appeal confirmed the judgment.

Joyce Easterling instituted an action against Dr Walton in **Easterling v Walton**<sup>72</sup> to recover damages for injuries sustained through the alleged negligence of the defendant in failing to remove a laparotomy pad from her abdomen after completion of the operation. The trial court held that *res ipsa loquitur* was not applicable. On appeal the court held that the doctrine was applicable under the facts of the case. It found that the plaintiff's evidence showed that while she was in an unconscious state the defendant was in control of the operation as the 'captain of the ship'.

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<sup>72</sup> 208 Va 214 156 SE2d 787(1967) 791.



The inadvertent failure of the defendant to remove the lap pad from the plaintiff's abdominal cavity before closing the operation wound constituted such an act or omission in the performance of the duty owed to plaintiff that a layman could infer negligence without the aid of expert testimony. The plaintiff's evidence warranted an inference of negligence which should have been left to the jury and the court found that it was an error for the trial court to withdraw this question from their consideration.

In **Chapetta v Ciaravella**<sup>73</sup> the plaintiff underwent a total abdominal hysterectomy. Subsequent to the operation she became nauseated and vomited for several days. Eight days after the operation she was surgically opened once again and it was discovered that a laparotomy pad had been retained in the first operation. On appeal the court found that the application of the doctrine of *res ipsa loquitur* was proper and with regard to the defendant's explanation stated that the burden was upon the defendant to affirmatively establish his use of diligence and reasonable care together with his best judgment in the treatment of the patient. It found further and as a collory, that the defendant was under a burden to negative his negligence.

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<sup>73</sup> 311 So2d 563 (La App 1975).

It held that the defendant had not exculpated himself of negligence by a preponderance of the evidence.

A medical negligence action was brought in **Turney v Anspaugh**<sup>74</sup> where a surgical sponge was retained in the plaintiff's body following a hysterectomy and it was removed in a subsequent operation. The court found in favour of the plaintiff against the first defendant and on appeal the judgment was confirmed.

In its judgement the Court of Appeal referred with approval to the opinion in **St John's Hospital & School of Nursing v Chapman**<sup>75</sup> where the court held that *res ipsa loquitur* was a rule of evidence only and that the inference of negligence was rebuttable by a satisfactory explanation offered by the defendant. The weight of the rebuttable evidence offered by the defendant to overcome the inference of negligence is for the jury to decide. In this regard it held that unless all reasonable minds are bound to reach the same conclusion, it is the jury, in a jury trial, that is to determine whether or not the explanation offered by the defendant is satisfactory to overcome the

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<sup>74</sup> 581 P2d 1301 (Okla 1978).

<sup>75</sup> 434 P2d 160 (Okla 1967).

inference of negligence, even though the defendant's evidence may be undisputed.

In **Mudd v Dorr**<sup>76</sup> a husband and wife instituted an action against a surgeon for damages suffered by Mrs Mudd as a result of the alleged retention of a cottonoid sponge after an operation. On appeal, Berman J found that when, during surgery, a foreign object such as a sponge is lost in a patient, a *prima facie* case of negligence is made out under the doctrine of *res ipsa loquitur* and the burden falls upon the defendant to prove that because of the general nature or particular nature or particular circumstances of the surgery such apparent misfeasance was not negligent.

He further held that as the evidence established all the requisite conditions, the trial court's refusal to instruct on the doctrine of *res ipsa loquitur* and its direction of a verdict for the defendant because of plaintiff's failure to present expert evidence was an error. He also held that the court's instruction that unless there is expert evidence concerning the question as to what constitutes the standard of care of a reasonably prudent physician,

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<sup>76</sup> 40 74 574 P2d 97 (Colo App 1977).

the plaintiff cannot prevail, was also erroneous. The judgment was accordingly reversed and remanded with directions.

Dr Hicken in **Nixdorf v Hicken**<sup>77</sup> repaired the plaintiff's cystocele and rectocele and also performed an amputation of a portion of the cervix. During the procedure one of the curved cutting needles used to suture the torn diaphragm became disengaged from the needle holder and although he attempted to retrieve it, he was unsuccessful. The defendant failed to inform her about the retained needle and when she was informed about its presence years later, she instituted an action for damages against him. Maughan J, writing for a divided court (Crockett, Wilkens and Hall JJ concurring, Stewart J dissenting in part and concurring in part) *inter alia* held as follows:

“The evidence presented at the trial indicates the instrumentality which caused the bad result was in the exclusive control of the defendant at the time of the accident. Furthermore, the plaintiff was under a general anesthetic and could not participate or contribute to the act causing the injury. These facts when combined with the nature of the accident provide a sufficient evidentiary foundation for the application of the *res ipsa loquitur* doctrine in this case. The application of the doctrine provides a rebuttable inference of negligence which will carry the plaintiff's case past the motion of nonsuit.”

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<sup>77</sup> **612 P2d 348 (Utah 1980) 353**. See also: Comment, “*Failure to Remove Surgical Instruments Held to Raise Inference of Res Ipsa Loquitur*” 1981 *Utah L Rev* 169 236.

In **Tice v Hall** <sup>78</sup> the plaintiff underwent hernia surgery after which a surgical sponge was retained and discovered years later. Martin J held that the evidence of the defendant and his expert concerning the scrupulous sponge counting and recounting procedures employed by the surgical team in that, and other cases and the reliance of the surgeons on the sponge-count provided by nurses in assistance, does not absolve the surgeon from his duty to remove all harmful and unnecessary foreign objects at the completion of the operation. The presence of a foreign object therefore raises an inference of lack of due care.

The plaintiff in **Sullivan v Methodist Hospitals of Dallas** <sup>79</sup> instituted an action against the hospital and the doctor when a sponge was retained in her abdomen after a caesarian section. On appeal the judgment was reversed and remanded, Kennedy J holding *inter alia* with regard to *res ipsa loquitur*, that the doctrine is seldom applied to medical negligence cases in Texas because it frequently raises issues which fall beyond the knowledge of laymen. He continued to state that **Texas** courts had, prior to 1977, held that in certain

<sup>78</sup> 310 NC 589 313 SE2d 565 (1984).

<sup>79</sup> 699 SW2d 265 (13 Dist Tex App 1985).

circumstances the plaintiff did not have to prove that the doctor's diagnosis was negligent and the proximate cause of the plaintiff's injuries. This holding had specifically been applied to circumstances involving the leaving of surgical instruments or supplies inside the body of the patient.

In **Anderson v Somberg**<sup>80</sup> the cup of an angulated pituitary rongeur broke off while the instrument was being manipulated in the plaintiff's spinal channel during a back operation. The surgeon attempted to retrieve the object but was unable to do so and the operation was terminated. The retained object caused complications and further medical intervention was required. The plaintiff instituted proceedings against the surgeon, the hospital, the manufacturer of the instrument and the supplier. In this instance the court noted that the doctrine had been expanded to encompass cases where the negligent cause was not the only or most probable theory in the case, but where alternate theories of liability accounted for the only possible causes of injury. In such cases the court required the defendants' to come forward and tender their evidence, providing a development which represents a substantial deviation from earlier conceptions of *res ipsa loquitur*.

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<sup>80</sup> **supra 338**. See also: PCK "Torts – Medical Malpractice – Procedural Effect of Res Ipsa Loquitur" 1976 *Tennessee L Rev* 502ff; De Lousanoff 29.

The plaintiff in **Prooth v Wallsh**<sup>81</sup> instituted an action against the defendant after undergoing heart by-pass surgery where a surgical clamp had inadvertently been left in his chest cavity. During the operation, the patient's heartbeat became critically erratic and although the surgical team had discovered that a clamp was missing, the chief surgeon decided to close and suture the patient's chest immediately because time was of the essence and his life had to be saved.

The plaintiff satisfied the burden of presenting a *prima facie* case of negligence by establishing the presence of the clamp in his chest, entitling him to a charge based on *res ipsa loquitur*. The defendants tendered substantial evidence explaining why the clamp had been retained and under these circumstances the jury may have concluded that the presence of the clamp resulted from an emergency situation and as such might or might not have been negligent.

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<sup>81</sup> **supra 663**. For additional examples see also: **Tiller v Von Pohle** 72 Ariz 11 230 P2d 213 (1951); **Mondat v Vallejo General Hospital** 152 2d 588 313 P2d 78 (Cal App 1957); **Johnston v Rhodis** 151 F Supp 345 (DC Dist Col 1957); **Sherin v Lloyd** 246 NC 363 98 SE2d 508 (1957); **Swanson v Hill** 166 F 296 Supp (DC ND 1958); **Williams v Chamberlain** 316 SW2d 505 (Mo 1958).

### 4.11.3 ANAESTHETICAL PROCEDURES

Errors in anaesthesiology often lead to morbidity, mortality, or serious physiological injury. Although a victim of an anaesthetic accident may be at a disadvantage in proving how the injury occurred because of unconsciousness or lack of familiarity with medical practices or substances, circumstances accompanying the injury may be of such a nature as to raise a presumption or create an inference of negligence on the part of the anaesthetist <sup>82</sup>.

In **Ybarra v Spanguard** <sup>83</sup> the plaintiff underwent an appendectomy. When he awakened from the anaesthetic he felt a sharp pain about halfway between his neck and his right shoulder. The pain subsequently spread down to the lower part of his arm and he later developed atrophy and paralyse of the muscles around the shoulder. In an appeal against a judgment of nonsuit the plaintiff was successful and the judgment was reversed. With regard to the requirement of exclusive control when the doctrine of *res ipsa loquitur* is applied, Gibson CJ found that a patient is likely to come under the care of a number of persons in different types of contractual and other relationships

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<sup>82</sup> Koenders “*Medical Malpractice: Res Ipsa Loquitur In Negligent Anesthesia cases*” 49 ALR 63.

<sup>83</sup> **supra 687**. See also fn 84 infra.



with each other, in a modern hospital. He went on to state that either the number or the nature of the relationships alone determine whether the doctrine of *res ipsa loquitur* applies or not. In this regard the court found that every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him, and that each of these defendants would be liable for any failure in this regard.

The defendants' employers would be liable for the neglect of their employees and the doctor would be liable for those who became his temporary servants for the purpose of assisting in the operation. The court concluded by holding that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had control over his body or the instrumentalities which may have caused the injuries may properly be called upon to meet the inference of negligence by explaining their conduct <sup>84</sup>.

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<sup>84</sup> For further discussion of the case see also: Rubsamén “*Res Ipsa Loquitur in California Medical Malpractice Law - Expansion of a Doctrine to the Bursting Point*” 1962 *Stan L Rev* 251 255; Eaton “*Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment*” 1982 *Georgia L Rev* 33 67ff; Dalhquist “*Common Knowledge In Medical Malpractice Litigation: A Diagnosis and Prescription*” 1983 *Pacific L J* 133 141 FF; Green “*Physicians and Surgeons: Res Ipsa Loquitur and Medical Malpractice in Oklahoma*” 1986 *Oklahoma L Rev* 539 543. See also 198-201 **supra** and 258-260 **infra**.

In **Horner v Northern Pacific Beneficial Asso**<sup>85</sup> the plaintiff underwent a hysterectomy and when she regained consciousness she found that her right arm was paralysed. The hospital gave no explanation with regard to the cause of the injury other than to show that this type of paralyses might be produced by some form of trauma, pressure or traction while the patient is under anaesthesia. The plaintiff relied on the doctrine of *res ipsa loquitur* successfully and the hospital appealed. The court stated that where the requirements of *res ipsa loquitur* are met it is not essential for the plaintiff to lead further evidence of negligence to take the case to the jury.

The court reasoned that to emerge from abdominal surgery with a paralysed arm was such an extraordinary event, within the general experience of mankind as to raise an inference of negligence, which requires both an explanation and proof of negligence to meet. The court further held that as the other requirements for the application of the doctrine were met the verdict was supported by the evidence.

Mrs Seneris in **Seneris v Haas**<sup>86</sup> instituted an action against her obstetrician, anaesthetist and the hospital for damages due to paralyses after administration of the anaesthetic. The court entered a judgment of nonsuit

<sup>85</sup> **supra 518.**

<sup>86</sup> **supra 915.** See also: 197 **supra**; Harney 432.

and the plaintiff appealed. The judgment of nonsuit against the obstetrician was affirmed but reversed as to the anaesthetist and the hospital. The court alluded to the general principles applicable to the application of the doctrine.

In **Salgo v Leland Stanford JR University Board of Trustees**<sup>87</sup> the plaintiff suffered paralysis of his lower extremities after undergoing a translumbar aortography. On appeal the judgment of the court that it had been a prejudicial error to instruct as a matter of law that an inference of negligence arose under the circumstances, was reversed. With regard to the application of the doctrine of *res ipsa loquitur* the court highlighted the following dilemma:

“The great difficulty in the application of the doctrine is to determine where to draw the line. To apply it to all cases where an unexpected result occurs would hamstring the development of medical science. No medical man would dare to use new procedures, especially in surgery, because if injury resulted he would be prima facie guilty of negligence...Thus a great responsibility rests upon the courts to determine the point at which the doctrine will apply in order to be fair to the patient who has received a result which either common knowledge of laymen or of medical men teaches ordinarily would not occur without negligence, and to be fair to medical men if there is a result which could occur without negligence and which should not impose upon them the presumption of negligence”.

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<sup>87</sup> **supra 154 170**. See also: Rubsamen 1962 *Stanford L Rev* 260; Pegalis and Wachman *American Law of Medical Malpractice* (1981) 102; Harney 432.

The plaintiff in **Quintal v Laurel Grove Hospital**<sup>88</sup> suffered a cardiac arrest during minor surgery as a result of which he became a spastic paraplegic, blind and mute because of severe brain damage. The jury returned verdicts against both doctors and the hospital, but motions for judgments notwithstanding the verdict, and in the alternative, a new trial was awarded all defendants. In referring to the conditional *res ipsa loquitur* the court stated that the facts of the case represented a clear situation where the conditional *res ipsa loquitur* finds application. If the jury found facts, which they were entitled to find from the evidence, the doctrine had to apply. In *casu* it was an injury which was very rare, and which may have resulted from negligence. The question was whether it was more probable that it resulted from negligence or not.

The plaintiffs, from the evidence of the defendants and their witnesses proved that the injury could have occurred as a result of negligence. In such circumstances the jury should be instructed that if they find certain facts to be true they should apply the inference involved under *res ipsa loquitur*. In this case the injury involved a known risk which rarely occurs. The instrumentality and the procedures involved were under exclusive control of

<sup>88</sup> **supra 161**. See also Harney 436.

exclusive control of the defendants and the plaintiff anaesthetized. Such circumstances called for an explanation. The defendants' explanation consisted of what they did and that their actions represented due care. There was testimony that 90 percent of deaths occurred as a result of faulty intubation. There was also evidence that would justify the jury in inferring that if the operation had been performed and three minutes of cardiac arrest ensued there would have been no brain damage. Other evidence established that there were erasures on the temperature chart. The court held that under such circumstances the test was whether the jury could find that it was more probable than not that the injury was the result of negligence.

A spinal anaesthetic was administered to the plaintiff in **Mayor v Dowsett**<sup>89</sup> during childbirth as a result of which the plaintiff suffered paralysis. In a subsequent action for damages against Dr Dowsett the trial court entered a judgment for the defendant and the plaintiff appealed. The Court of Appeal reversed the judgment and with regard to the application of the doctrine of *res ipsa loquitur* found that on a motion for a directed verdict all the

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<sup>89</sup> **supra 234.**

evidence, whether introduced by the plaintiff or the defendant is to be considered and the plaintiff is entitled to the benefit of every legitimate inference which may be drawn from the evidence. In *casu* the court found that the evidence was to the effect that the requirements for the application of the doctrine were met.

In **Edelman v Zeigler**<sup>90</sup> the plaintiff instituted an action on behalf of his wife, who had suffered an extensive brain injury as a result of cardiac arrest allegedly caused by the administration of anaesthesia. In this instance the plaintiff alleged specific acts of negligence to support his claim. The jury reached a verdict in favour of the defendant anaesthetist and the plaintiff appealed, arguing that the trial court should have instructed the jury that if they could find that the injury was of a kind that ordinarily does not occur in the absence of negligence, they were entitled to make an inference of negligence.

The Court of Appeal reversed the trial court's decision, holding that the doctrine of *res ipsa loquitur* could be based on specific acts of negligence.

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<sup>90</sup> 44 Cal Rptr 114 122 (1965). See also: **Morgan v Children's Hospital 18 Ohio St3d 185 18 Ohio Br 253 480 NE2d 464 (1985); Brown v Dahl 705 P2d 781 (Wash App 1985).**

The court found that the allegations of specific acts of negligence did not weaken but rather fortified the claim to a *res ipsa loquitur* instruction.

The plaintiff in **Herbert v Travellers Indemnity Co.**<sup>91</sup> allegedly suffered permanent injury after being anaesthetised during an operation. The medical experts agreed that the pain and sensation of electric shock from which he suffered emanated from the spinal needle used during the anaesthetic procedure, coming into contact with a nerve root. In their evidence the medical experts were *ad idem* that it was contrary to the professional standards of the community to inject spinal anaesthesia directly into the nerve roots and that it was never knowingly done. The object was to inject the anaesthetic drug into the fluid of the spinal cord and ‘bathe’ the nerve roots in the anaesthetising solution.

In view of this evidence the court stated that the trial court should instruct the jury that if they find that the anaesthetising agent was injected directly into the nerve root and it probably would not have happened without some fault on the part of the defendant, and that they must then evaluate the defendant’s evidence and decide whether he has sufficiently explained his

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<sup>91</sup> 239 So2d 367 (La App 1970).

conduct to exculpate himself. The court further stated that the defendant testified about what techniques he used and what precautions he took in administering the anaesthetic. The expert witnesses agreed that the methods employed by the defendant met the required standard. Under the circumstances the jury's judgment as to the question of the defendant's possible exculpation on the evidence would largely depend on their evaluation of him as a witness.

In **Clark v Gibbons**<sup>92</sup> the plaintiff instituted an action against a surgeon and an anaesthetist for injuries sustained when a spinal anaesthesia wore off prematurely. Although the level of anaesthesia remained adequate at first, the doctors noticed from the plaintiff's unconscious movements that the anaesthesia was beginning to wear off. The anaesthetist testified that the Demorol could have been used to extend the unconscious state of the plaintiff, and that there was no particular reason not to use it, but that the extension it could achieve may have still been insufficient to complete the operation.

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<sup>92</sup> **supra** 525. See also Harney 437.



The operation was in fact terminated prematurely and the operative report indicated the circumstances under which the operation terminated prematurely. As a result of the incomplete operation the plaintiff suffered from painful arthritis in the ankle joint. The plaintiff charged the anaesthetist with negligence in selecting and administering the anaesthetic which wore off before completion of the operation and the surgeon for not informing the anaesthetist that the operation could last longer than two hours.

The jury returned a verdict in favour of the plaintiff and the defendants appealed both on the bases that the verdict was not supported by sufficient evidence of negligence and that the trial court committed a reversible error by giving a conditional *res ipsa loquitur* instruction to the jury.

On appeal the court recognised that when a medical practitioner performed an act which caused an injury which did not ordinarily occur in the absence of negligence, it increased the probability that negligence caused the injury. The court concluded that the evidence on the whole was sufficient for the

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jury to find that the injury was probably the result of the negligence of the medical practitioners. The court affirmed the trial court's decision that the facts of the case warranted the use of a conditional *res ipsa loquitur* instruction.

The plaintiff in **Younger v Webster**<sup>93</sup> instituted an action against the defendant doctor for loss of sensory feeling from his navel to his knees after undergoing hernia surgery during which spinal anaesthesia was administered to him. The court held that the plaintiff was entitled to the application of the doctrine of *res ipsa loquitur* because he submitted himself to the custody and care of medical personnel, was rendered unconscious and received some injury from instrumentalities used in his treatment.

The court stated that without the application of the doctrine, a patient who received injuries of a serious nature caused by someone's apparent negligence, would be unable to recover damages unless the doctors and nurses in attendance chose to disclose the facts establishing liability.

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<sup>93</sup> 9 87 510 P2d 1182 (Wash App 1973).

In **Funke v Fieldman**<sup>94</sup> the plaintiff sustained nerve damage as a result of the administration of a spinal anaesthetic. She testified that she experienced extreme pain during the initial procedure and told the doctor that she thought something was wrong because she could still feel sensation in her legs. The needle was then removed and reinserted in a different position. When the anaesthesia wore off paralyses remained on the left side with total loss of sensation to pain and reduced sensitivity to touch.

The trial court found that the doctrine of *res ipsa loquitur* was not applicable to the case. The Court of Appeal upheld the trial court's judgment in respect of the application of the doctrine and stated that in its opinion the administration of spinal anaesthesia which results in permanent nerve damage to the patient is a procedure which is so complicated, considering the delicate anatomy of the human spine and the various possibilities of the injury from the needle or anaesthetic solution, as to lie beyond the realm of common knowledge and experience of laymen as to whether such a result would not ordinarily occur in the absence of negligence.

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<sup>94</sup> **212 Kan 524 512 P2d 539 (1973).**

In **Pederson v Dumouchel**<sup>95</sup> the plaintiff failed to awaken from a general anaesthetic for almost a month after surgery with apparent brain injury. The court refused an instruction to the jury on the doctrine of *res ipsa loquitur* and the jury rendered a verdict in favour of the defendants. On appeal the court held that the doctrine was in fact applicable as negligence could be inferred when the general experience and observation of mankind is such that the result would not be expected without negligence.

The plaintiff in **Cangelosi v Our Lady of the Lake Regional Medical Center**<sup>96</sup> sustained a fracture of two cartilage rings in his trachea during or after gallbladder surgery. This later resulted in sixteen surgical procedures to reduce the continual growth of scar tissue and to maintain an adequate airway. The plaintiff also had a permanent tracheostomy as a result of the tracheal condition. At the trial the plaintiff presented the expert testimony to establish that a traumatic injury occurred during the insertion of the tube or during the 53 hours of intubation and that substandard medical care was more probably than not, the cause of the injury.

The defendants presented evidence to establish that tracheal stenosis may

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<sup>95</sup> 72 Wash 2d 73 431 P2d 973 (1967).

<sup>96</sup> *supra* 1009.

occur in the absence of substandard medical care and that *perichondritis*, an inflammation which slowly develops and dissolves the cartilage in the tracheal rings, was an equally plausible non negligent explanation for the tracheal stenosis. The trial judge, noting that the plaintiff had solely relied upon *res ipsa loquitur* and had presented no direct evidence of substandard care, granted a directed verdict in favour of the defendants and dismissed the case. On appeal the court stated that the standard to be applied by the trial judge in deciding whether to instruct the jury on *res ipsa loquitur* is the same standard used in deciding whether to grant a directed verdict, namely, whether the facts and inferences point so strongly and overwhelmingly in favour of one party that reasonable men could not arrive at a contrary verdict. It further stated that if reasonable minds could reach different conclusions on whether the defendant's negligence caused the plaintiff's injury, the judge must present the issue to the jury and instruct the jury on the doctrine of *res ipsa loquitur*.

The court held that the evidence indicating that the injury was caused other than by the defendant's negligence is at least equally plausible as the evidence that it was caused by the defendants' negligence. The plaintiff had

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accordingly failed to prove that, more probably than not, his injury was caused by any defendant in this case and affirmed the judgment of the trial court.

In **Welte v Mercy Hospital**<sup>97</sup> the plaintiff was admitted to the hospital for surgery on her nose and was unintentionally burned on her arm when an anaesthetic that was to be injected into her vein, infiltrated the surrounding tissue. An action was instituted against the anaesthetist and the hospital for the alleged negligence in the administration of the anaesthetic and failure to procure the plaintiff's informed consent. The court granted partial summary judgment against the anaesthetist with regard to the general negligence claim and summary judgment in favour of the defendants upon jury verdicts, against which the claimants appealed.

With regard to the trial court's granting of partial summary judgment on the general negligence claim the court held that the record established

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<sup>97</sup> **supra 437 441**

circumstances of the occurrence sufficient to defeat summary judgment without the necessity of leading expert medical evidence as follows:

“The chemical burn to Welte’s arm was caused by sodium pentothal that Dr Bello injected into her vein which then infiltrated or escaped from the vein into the surrounding tissues. We believe it is within the common experience of laypersons that such an occurrence in the ordinary course of things would not have happened if reasonable care had been used. The insertion of a needle into a vein is a common medical procedure that laypersons understand. It is a procedure which has become so common that laypersons know certain occurrences would not take place if ordinary care is used”.

The judgment was accordingly reversed and remanded.

The plaintiff in **Wick v Henderson, Mercy Hospital and Medical Anesthesia Associates**<sup>98</sup> underwent gallbladder surgery. Post-operatively she felt pain in her left arm upon awakening. Upon discharge from the hospital she was told that the arm was ‘stressed’ during surgery. It was ascertained later that she had suffered permanent injury to the ulnar nerve located in her upper left arm. She instituted an action against the defendants claiming damages for a disfiguring scar as a result of corrective surgery, pain and past and future medical expenses. With regard to the requirement of

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<sup>98</sup> **supra 645.**

exclusive control when the doctrine of *res ipsa loquitur* is applied the court stated that an examination of recent cases revealed that the test for actual exclusive control of an instrumentality had not been strictly followed, but exceptions had been recognised where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. It held that the test had become one of the right to control rather than actual control<sup>99</sup>.

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<sup>99</sup> See also: Koenders 49 *ALR* 4th 63ff; Levine “*Anesthesia - Accidents and Errors*” 1969 *De Paul L Rev* 432; Blumenreich “*The Doctrine of Res Ipsa Loquitur*” 1987 *AANA* 13; Butterworth *et al* “*Transient Median Nerve Palsy After General Anesthesia: Does Res Ipsa Loquitur Apply?*” 1994 *Anesth Analg* 163; Liang and Coté “*Speaking For Itself: The Doctrine of Res Ipsa Loquitur in a Case of Pediatric Anesthesia*” 1996 *J Clin Anesth* 399. For additional cases of the application of *res ipsa loquitur* to anaesthetical procedures see for example: **Barker v Hearn** 82 SW 417 (Tex Civ App 1935); **Dierman v Providence Hospital** supra 12; **Cavero v Franklin General Benev Soc** 36 Cal2d 301 223 P2d 471 (1950); **Luy v Shinn** 40 Hawaii 198 (1953); **Frost v Des Moines Still College of Osteopathy & Surgery** supra 306; **Surabian v Lorenz** 229 2d 462 40 Cal Rptr 410 (5<sup>th</sup> Dist Cal App 1964); **Oberlin v Friedman** 5 Ohio St2d 1 34 Ohio Ops 2d 1 213 NE2d 168 (1965 Lucas Co); **Dunlap v Marine** 242 2d 162 51 Cal Rptr 158 (2d Dist Cal App 1966); **Bardesonno v Michels** 3 Cal3d 780 91 Cal Rptr 760 478 P2d 480 45 ALR 3d 717 (1970); **Thorp v Corwin** 260 Or 23 488 P2d 413 (1971); **Wiles v Myerly** 210 NW2d 619 (Iowa 1973); **South West Texas Methodist Hospital v Mills** 535 SW2d 27 writ ref nre (Tex Civ App Tyler 1976); **Ewen v Baton Rouge General Hospital** 378 So2d 172 cert den (La) 385 So2d 268 (La App 1<sup>st</sup> Cir 1979); **Guzman v Faraldo** 373 So2d 66 cert den (Fla) 383 So2d 1195 (D3 Fla App 1979); **McKinney v Nash** 120 3d 428 174 Cal Rptr 642 (3<sup>rd</sup> Dist Cal App 1981); **Thomas v St Francis Hospital Inc** 447 A2d 435 (Del Sup 1982); **Parks v Perry** supra 142; **Morgan v Children’s Hospital** supra 464.



#### 4.11.4 GENERAL SURGICAL PROCEDURES

In some cases involving injuries which result from surgical procedures the doctrine has been held applicable on the basis that from the facts and the evidence it appeared that the injury would not have occurred in the absence of negligence on the part of the defendant.

In **Mayers v Litow**<sup>100</sup> the plaintiffs instituted an action against the doctor and the hospital for alleged medical negligence arising from a thyroidectomy performed on the plaintiff and during which her recurrent laryngeal nerve was allegedly severed. The trial court entered judgments of nonsuit and the plaintiffs appealed. The Court of Appeal affirmed the judgment in favour of the hospital but reversed the judgment against the doctor. The court held that the evidence raised a question of fact as to whether or not the defendant, Dr Litow, exercised reasonable care in conducting the operation on the plaintiff, and found that the plaintiffs' evidence is sufficient to submit to the jury, under proper instructions, the question of the applicability of the doctrine of *res ipsa loquitur*.

In **Fehrman v Smirl**<sup>101</sup> the plaintiff instituted an action against the surgeon

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<sup>100</sup> **154 2d 413 316 P2d 351 (Cal App 1957)**. See also: Holder “*Res Ipsa Loquitur*” 1972 *JAMA* 121; Harney 432.

<sup>101</sup> **supra 255**.

alleged permanent incontinence and sexual impotence after a prostatectomy. The circuit court dismissed the claim and the plaintiff appealed. The Court of Appeal reversed the judgment and remanded for a new trial. With regard to the question as to whether *res ipsa loquitur* could be properly invoked in a medical negligence action the court held that it would seem that situations may arise in medical negligence cases where the doctrine of *res ipsa loquitur* may be properly invoked. It held further that this did not however mean that an instruction embodying *res ipsa loquitur* is proper in every medical malpractice case.

The plaintiff in **Silverson v Weber**<sup>102</sup> suffered a vestigovaginal fistula after undergoing a hysterectomy. She did not present expert testimony at the trial and the defendant's evidence was to the effect that although it is regarded as a rare complication, a fistula of that nature following a hysterectomy might have several causes other than the surgeon's negligence. The trial court did not instruct the jury on *res ipsa loquitur* and on appeal the court held that to permit an inference of negligence under the doctrine of *res ipsa loquitur* merely because an uncommon complication develops would place to great

<sup>102</sup> **supra 97.**

a burden upon the medical profession and might result in an undesirable limit on the use of operations and new procedures involving an inherent risk of injury, even when due care is used.

In **Tomei v Henning**<sup>103</sup> the defendant performed a hysterectomy on the plaintiff during which he accidentally sutured her right ureter in two places. The accident was not discovered until four days later. Corrective surgery by an urologist was unsuccessful and the plaintiff's right kidney had to be removed. At the trial the defendant admitted that he unintentionally sutured the ureter but presented evidence to the effect that the misplacing of the sutures and the failure to discover it during the operation was an unavoidable accident and not the result of negligence on his part.

The trial court entered a judgment for the defendant on the complaint and a judgment for the plaintiff on the cross-complaint, against which both the defendant and the plaintiff appealed. In reversing the judgement Traynor CJ held with regard to the application of a conditional *res ipsa loquitur* that under a *res ipsa loquitur* instruction it could ask whether it is more likely than not that when such an accident occurs, the surgeon is negligent. Since the verdict was reached without the benefit of a *res ipsa loquitur* instruction,

<sup>103</sup> **supra 633**. See also Harney 440.

it established that the jury could not find negligence along the first route and could not identify any specific negligent conduct. Had the instruction been given, however, the jury might reasonably have concluded that regardless of how the accident might have happened or how it could have been avoided, its happening alone supported an inference of negligence. The court concluded that it was reasonably probable that a result more favourable to the plaintiff could have been reached if the instruction had been given.

The plaintiff in **Fraser v Sprague**<sup>104</sup> appealed from a judgment of nonsuit in an action arising from an operation performed by the defendant for the removal of the lesser saphenous vein. After the operation the plaintiff suffered from an impairment of the common peroneal nerve. With regard to the application of the doctrine of *res ipsa loquitur* Associate Judge Tamura stated as follows:

“...The evidence of extreme rarity coupled by the following additional evidence was sufficient to entitle to have the cause submitted to the jury under a conditional *res ipsa loquitur* instruction: the operation was relatively commonplace rather than complex or unusual; at the time he recommended surgery, defendant made no mention of risk of nerve injury. There was expert testimony that the injury would have been unlikely had the operation been performed with due care; There was expert

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<sup>104</sup> 270 2d 736 76 Cal Rptr 37 (Cal App 1969) 43. See also Harney 442.

testimony that the size of the incision made by the defendant would have required 'vigorous' use of retractors in the proximity of the injured nerve; there was expert testimony that overtight bandaging was the probable cause of the injury; the defendant admitted that it was probable that the peronial nerve was bruised during surgery and the bruising during the course of the surgical procedure in question is avoidable by observing 'proper surgical precautions'; the plaintiff was furnished extensive post operative and physical therapy treatments without charge. The foregoing evidence was sufficient to permit the jury to draw an inference of negligence from the fact of the accident".

The judgment was accordingly reversed.

In **Dacus v Miller**<sup>105</sup> the plaintiff instituted an action against her surgeon after allegedly suffering an injury to her facial nerve during a radical mastoidectomy revision. The circuit court entered judgment for the defendant and the plaintiff appealed. The Supreme Court held that expert evidence to the effect that if due care were exercised injury to the facial nerve would not ordinarily occur, was sufficient to authorize submission of *res ipsa loquitur* to the jury but affirmed the trial court's finding to refuse to submit a requested instruction to the jury thereon, where the complaint at the time of submission of the case to the jury allegedly only specified

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<sup>105</sup> 257 Or 337 479 P2d 229 (1971).

negligence and the requested instruction failed to limit the jury from inferring negligence in the particulars alleged in the complaint.

Severe and permanent injuries to her hands were sustained by Mrs Walker in **Walker v Rumer**<sup>106</sup> after undergoing a bilateral *palmar fasciectomy*. The trial court entered an order dismissing one count of the complaint and the plaintiff appealed. The appellate court reversed and remanded and the defendant's petition for leave to appeal was granted. The Supreme Court affirmed the judgment and with regard to the 'common knowledge' requirement in respect of the application of the doctrine of *res ipsa loquitur* stated that the defendant's argument that the doctrine of *res ipsa loquitur* could not be applied because the bilateral palmar fasciectomy performed in this case was not a 'common place' surgical procedure with which the average person is familiar and able to understand, indicated a misapprehension of the relationship between 'common knowledge' exceptions to the requirement of proof by expert testimony in medical malpractice cases and the doctrine of *res ipsa loquitur*.

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<sup>106</sup> **supra 689**. See also Harney 440.

The requirement for *res ipsa loquitur* according to the court, was not that the surgical procedure be ‘commonplace’ or that the ‘average person’ should be able to understand what is involved but rather that the determination which must be made as a matter of law is whether the occurrence is such as in the ordinary course of things would not have happened if the party exercising control or management had exercised proper care. That determination may rest either upon the common knowledge of layman or expert Testimony.

Edward Kolakowski in **Kolakowski v Voris**<sup>107</sup> claimed damages in the circuit court of Cook County from his physicians and the Mercy Hospital after allegedly suffering impaired function of his cervical spine cord following an operation to remove a disc from his spine. He lost use of his limbs and became quadraplegic. The circuit court granted the hospital’s motion for summary judgment and the plaintiff appealed. The Supreme Court affirmed the Appellate Court’s judgment to reverse and remand. With regard to the requirement of exclusive control the court found in *casu*, that the plaintiff at the time of the alleged injury was placed in the care and custody of the named defendants and since the plaintiff was under a general anaesthetic during surgery he was unable to ascertain the cause of his

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<sup>107</sup> **supra 1003**. See also Harney 442.

injuries. The cause was in the exclusive knowledge of the defendants. It was under these circumstances that the plaintiff's only recourse had been to rely on the doctrine of *res ipsa loquitur*. The theory advanced by the defendant was that whenever a doctor acting in the capacity of an independent contractor, participates in surgery in the defendant's hospital, the element of control ceases. The court indicated that this approach was regarded as manifestly unfair because doctors and the hospital, at the time of surgery, each owed an independent duty to the patient and exercised concurrent control over the operation and equipment.

It found that when a patient submits himself to the care of a hospital and its staff and is rendered unconscious for the purpose of surgery performed by an independent contracting surgeon, the control necessary under *res ipsa loquitur* would have been met. The burden will then shift to the hospital to dispel the inference that it exercised the control necessary for the application of *res ipsa loquitur*<sup>108</sup>.

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<sup>108</sup> For additional examples of the application of the doctrine to surgical procedures see also: **Emrie v Tice 174 Kan 739 258 P2d 332 (1953)**; **Belshaw v Feinstein 258 2d 711 65 Cal Rptr 788 (Cal App 1968)**; **Rawlings v Harris 265 2d 452 71 Cal Rptr 288 (Cal App 1968)**; **Cline v Lund 31 3d 755 107 Cal Rptr 629 (Cal App 1973)**; **Faulkner v Pezeshki 44 2d 186 337 NE2d 158 (Ohio App 1975)**; **Anderson v Gordon 334 So2d 107 (Flo App 1976)**; **Miller v Kennedy 91 Wash 2d 155 588 P2d 734 (1978)**; **Holloway v Southern Baptist Holiday 367 So2d 871 (La App 1978)** ; **Kennis v Mercy Hospital Medical Center 491 NW2d 16 (1992)** **Iowa Sup LEXIS 388 (1992)**; **Vogler v Dominguez and Deaconess Hospital Inc 642 NE2d 56 Ind App LEXIS 1472 (1993)**.



#### 4.11.5 DENTAL PROCEDURES

In a number of cases involving injury to the plaintiff consequent to dental procedures plaintiffs have sought to rely on the doctrine.

In **Vergeldt v Harzell**<sup>109</sup> the dentist was working with an electric drill on the plaintiff's teeth when it slipped, penetrating the floor of the plaintiff's mouth, lacerating her tongue and otherwise causing serious injury. In this instance the court found that the requirements for the application of the doctrine had been met in that the apparatus was such that no injurious result would ensue without carelessness by the user. The equipment was under the exclusive control of the defendant at the time and the plaintiff did not contribute in any way to her injury. The court also stated that the defendant's ability to know the true cause of the accident was greatly superior to that of the plaintiff.

The plaintiff in **Razin v Zimmerman**<sup>110</sup> developed an abscess on her chin as a result of infected teeth. The x-ray machine which was used to secure a picture of the teeth caused severe burns. The court held that this kind of injury would not have happened if those who had the management exercised

<sup>109</sup> 1 Fed (2d) 633 (1924).

<sup>110</sup> 206 Cal 723 276 Pac 107 (1929).

due care. It also found that that everything which contributed to the accident was under the control of the defendant.

In **Whetstine v Moravec**<sup>111</sup> the root of a tooth was allowed to slip down the plaintiff's throat and passed into plaintiff's right lung. The court found that all the instrumentalities, including the body of the plaintiff, was under the exclusive control of the defendant. There was an occurrence which should not have occurred in the ordinary course of teeth extraction if due care had been exercised. There was no explanation by the defendant and because of the plaintiff's unconscious state, he had no idea what had happened. Under such circumstances the court found that the doctrine of *res ipsa loquitur* was applicable and a jury would be warranted in inferring therefrom that the plaintiff's injury was caused by the defendant's negligence.

#### **4.11.6 INJECTIONS**

As a general proposition the breaking of a hypodermic needle or other instrument during its use, is usually not sufficient, in itself, to render the doctrine applicable, since the break may be caused by some other factor other than the improper use of the instrument.

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<sup>111</sup> **228 Iowa 351 291 NW 425 (1940)**. See also Athur 1944 *SALJ* 217ff

In **Horace v Weyrauch**<sup>112</sup> the defendant had attempted to give the plaintiff an intravenous injection of an iodine dye for the purpose of performing a pyelogram. The defendant was unable to administer the injection intravenously and gave the injection subcutaneously into the plaintiff's left hip. The plaintiff suffered considerable pain and an ulcer later developed at the site of the injection which was subsequently excised by surgery. Expert evidence was led at the trial that it was good medical practice to give such an injection subcutaneously when it could not be given intravenously.

Further evidence was to the effect that unfavourable reactions to such subcutaneous injections were not rare but were a risk inherent therein, being caused by sensitivity of the individual patient to the iodine dye. The court held that it was doubtful in this case whether the doctrine would be applicable to the facts and that it depended on the question as to whether the layman could say as a matter of common knowledge or observation, or could draw a reasonable inference from the evidence, that the consequences of the injection were not such as would ordinarily follow if due care had been exercised.

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<sup>112</sup> 159 2d 833 342 P2d 666 64 ALR 2d 1276 (Cal App 1958).

The court found in this regard that the expert evidence supported the view that it was good medical practice to give the injection subcutaneously in such circumstances and that there was no basis for the plaintiff's contention that there was an inference of negligence because the injection was given subcutaneously. Moreover the complications which ensued were known risks to the treatment. As a result of a conflict with regard to other evidence the court however held that the case should have gone to the jury.

The plaintiff in **Williams v Chamberlain**<sup>113</sup> instituted an action against the defendant alleging *inter alia* that he broke a needle while attempting to inject a tetanus anti-toxin into the plaintiff's spinal canal and allowed the needle to remain in the plaintiff's back for 27 days before removing it. In this instance the court found that the breaking of a hypodermic needle did not in itself bespeak negligence and that they could break as a result of various causes. Such a break could therefore occur in spite of all the care and skill which a doctor or dentist employs.

In **Van Zee v Souix Valley Hospital**<sup>114</sup> the plaintiff injured his left hand and forearm when it was caught in the spokes of a blender. After having

<sup>113</sup> **supra** 505.

<sup>114</sup> **315 NW2d 489 (SD 1982)**. See also Regan "*Res Ipsa Loquitur Doctrine must be considered in Determining Negligence*" 1982 *Hospital Progress* 59.

been taken to hospital the injury was x-rayed, cleaned and sutured. Due to the severity of the injuries the plaintiff was taken to Souix Valley Hospital where he underwent surgery.

After discharge from the hospital the plaintiff experienced severe and persistent pain in his right arm to the extent that it nearly became immobile. The plaintiff alleged that he received an injection while he was unconscious during the surgery at the hospital which caused the pain and nerve damage to his right arm. The circuit court entered a judgment based on the jury verdict that the hospital was not negligent and the plaintiff appealed. The Supreme Court held that the evidence was sufficient to create a reasonable inference that the hospital was negligent and that such negligence was responsible for causing damage to the right arm. An instruction on the doctrine of *res ipsa loquitur* was therefore required and the court accordingly reversed the judgment and remanded for a new trial.

In **McWain v Tuscan General Hospital**<sup>115</sup> the plaintiff alleged that he suffered an injury to his sciatic nerve after an injection was negligently administered by a nurse employee of the defendant. Summary judgment was

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<sup>115</sup> **670 P2d 1180 (Ariz App 1983).**

entered against the plaintiff and he appealed. The court found that before the doctrine of *res ipsa loquitur* could be applied there must first be evidence

that a negligent act of the defendant was more likely to have caused the injury than any other cause. The court stated that in *casu* there was no such evidence. It found that the method of giving an injection, the site of the injection or the drug prescribed, are the proper subjects of medical experts to assist a lay jury in determining the facts. The burden was on the appellant to establish a standard of care and to prove a deviation from that standard by expert medical testimony unless the deviation is so grossly apparent that a layman would have no difficulty in recognising it <sup>116</sup>.

The plaintiff in **Wood v United States** <sup>117</sup> suffered a cerebrovascular stroke when a surgeon unintentionally injected Teflon paste into his carotid artery. At the time the plaintiff was undergoing a procedure known as a Teflon injection into the nasopharynx to treat his patent (open) eustachian tube. On the day following the procedure the plaintiff could not move his right arm or leg and the right side of his mouth was drooping. Doctors at the time,

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<sup>116</sup> *supra* 1180.

<sup>117</sup> 838 F2d 182 (6<sup>th</sup> Cir 1988).

suspected that he had suffered a stroke and subsequent tests confirmed their diagnoses. The United States District court found in favour of the defendants and the plaintiff appealed. The Court of Appeal *inter alia* found that the doctrine of *res ipsa loquitur* did not raise a presumption of negligence under Tennessee law, where the proper procedure was clearly not within the common knowledge of a lay person and where the plaintiff presented evidence of specific acts of negligence <sup>118</sup>.

#### 4.11.7 INFECTION

It is generally held, in accordance with the 'bad result' rule that the mere fact that a patient develops an infection in the area under treatment does not raise a presumption or inference of negligence on the defendant's part.

In **Rimmele v Northridge Hospital Foundation** <sup>119</sup> the plaintiff instituted proceedings against the doctors, nurses and hospital for medical negligence after suffering infection as a consequence of negligent administration of injections in her buttock. Judgment was granted in favour of the defendants and the plaintiff appealed.

The Court of Appeal found that where doctors neither administered the

<sup>118</sup> See also **Gaston v Hunter** 121 33 588 P2d 326 (Ariz App 1978).

<sup>119</sup> 46 3d 123 120 Cal Rptr 39 (Cal App 1975). See also Harney 439.

injections nor were the principal of any nurse who administered any injection, they were not liable for malpractice. It further found that the jury seemed to question whether the hospital had exclusive control and that the *res ipsa loquitur* instruction leaving questions of exclusive control and patient's negligence to the jury was prejudicially erroneous. The court affirmed in part and reversed in part with Hanson J dissenting.

In **Folk v Kilk**<sup>120</sup> the plaintiff instituted an action against the hospital, internist and otorhinolaryngologist, to recover damages resulting from a brain abscess which became manifest five days after the plaintiff underwent a tonsillectomy. The Superior Court granted a judgment of nonsuit in favour of the hospital and a directed verdict in favour of the doctors. The plaintiff appealed against the trial court's refusal of a *res ipsa loquitur* instruction.

The Court of Appeal affirmed the trial court's holding that in view of the medical evidence that the performance of a tonsillectomy, without first determining whether a prevailing *haemophilus influenza* or other bacteria were present in plaintiff's throat, was not a violation of the prevailing standard of care and the failure to take a throat culture in sufficient time to obtain its results before embarking on the surgery, did not constitute a

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<sup>120</sup> 53 3d 176 126 Cal Rptr 172 (Cal App 1975). See also Harney 439.



negligent act which in view of the rarity of a brain abscess after a tonsillectomy, would warrant the giving of a conditional *res ipsa loquitur* instruction <sup>121</sup>.

#### 4.11.8 DUTY OF CARE

The doctrine of *res ipsa loquitur* has also on occasion found application to circumstances where the plaintiff alleged that the defendant had breached a duty of care.

In **Meier v Ross General Hospital** <sup>122</sup> the widow of a decedent who had committed suicide, instituted an action against the doctor and hospital for wrongful death. The Superior Court entered a judgment for the doctor and the hospital and the plaintiff appealed.

The Supreme Court per Tobriner J, held that the duty of care of the hospital and others with regard to the treatment and care of the mentally ill and the

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<sup>121</sup> See also: **Pink v Slater** 131 2d 816 281 P2d 272 (Cal App 1955); **Valentine v Kaiser Foundation Hospitals** 194 2d 15 Cal Rptr 26 (Cal App 1961); **Wilson v Stillwill** 92 227 284 NW2d 773 (Mich App 1979).

<sup>122</sup> 69 Cal2d 420 423 71 Cal Rptr 903 445 P2d 519 (1968). See also Holder "Res Ipsa Loquitur" 1972 JAMA 1587.

fact that the doctor placed the decedent on the second floor following an attempted suicide (with a fully openable window through which the decedent jumped), permitted the jury to find that the doctor and the hospital more probably than not, had breached their duty of care to the decedent, even in the absence of expert testimony, since the accident was not inextricably connected with the course of the treatment involving the exercise of medical judgment beyond the knowledge of laymen. Under the circumstances the court reversed the judgement and remanded for a new trial.

In **Emerick v Raleigh Hills Hospital - Newport Beach**<sup>123</sup> the plaintiff was undergoing alcoholic rehabilitative treatment and was heavily medicated. Her condition and course of treatment required a higher degree of care than that owed by land occupiers generally. The sink fell when the plaintiff sat or leaned on it and the trial court entered judgment in favour of the doctor and the hospital.

On appeal it was found that it should have been anticipated that the plaintiff might lean or place her weight on bathroom fixtures. With regard to the doctrine of *res ipsa loquitur* the court *inter alia* said the following:

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<sup>123</sup> **supra 92.**

“It can be said with equal force here that no satisfactory explanation is offered by the hospital as to why a properly installed sink would fall under the admitted facts here. There is competent evidence, and common sense compels its belief, that a properly installed bathroom sink will withstand more than 20 to 50 pounds of pressure. Thus the inference is that the accident would not have occurred absent a defective installation of the sink. This evidence gives rise to the reasonable inference of neglect, the sine qua non to the application of *res ipsa loquitur*.”

The court accordingly reversed the judgment<sup>124</sup>.

## 4.12 LEGAL OPINION

### 4.12.1 INTRODUCTION

Widely diverging views are expressed by commentators in the USA with regard to the application of the doctrine of *res ipsa loquitur* to medical negligence cases and similar to the tendency reflected in reported authorities on the subject, there is certainly no unanimity concerning it. In

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<sup>124</sup> See also for example: **Kopa v United States 236 F Supp 189 (Hawaii 1964)**; **Duncan v Queen of Angels Hospital 11 3d 655 Cal Rptr 157 (Cal App 1970)**; **Sellars v Presbyterian Intercommunity Hospital 277 Or 559 P2d 876 (1977)**; Regan “*Proof of Reasonable Care Defends Hospital in Case Based on Res Ipsa Loquitur Theory*” 1983 *Hospital Progress* 62.

this regard Adamson says the following:

“Since *res ipsa loquitur* is the offspring of miscegenation between evidence and negligence, it, like its kissing cousin, the presumption, is of a very mixed blood indeed. It is part logic, part emotion, and part expediency. Apparently it has a “spirit” which controls its activities in a general sort of way. It is at once a helpful friend and an unbeatable foe. No wonder there is no unanimity concerning it”<sup>125</sup>.

#### **4.12.2 UTILITY OF THE DOCTRINE IN MEDICAL NEGLIGENCE CASES**

Commentators are, generally speaking, *ad idem* that the application of the doctrine to medical negligence cases is limited. The reason for that is that it is a well settled rule that doctors are no warrantors of care and that bad results ensue despite the exercise of due care and skill<sup>126</sup>. Another reason advanced in this regard is that the negligence of a doctor should be proved by way of expert testimony and not by a mere inference so that the jury can arrive at an intelligent conclusion based on a scientific exposition of the subject matter<sup>127</sup>.

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<sup>125</sup> Adamson 1962 *Minn L Rev* 1044.

<sup>126</sup> Shane 1945 *SALJ* 289; De Lousanoff 22.

<sup>127</sup> Podell 1977 *Ins Council J* 635.

One commentator states that certain recurrent factual elements support the application of the doctrine to medical negligence cases and although they may or may not be present in a given medical negligence action, their absence will not necessarily bar the use of the doctrine. The first element is the availability of evidence explaining the plaintiff's injury <sup>128</sup>.

The second factual element is the location of the plaintiff's injury. In this regard the commentator points out that in a large number of medical negligence cases, the doctrine has been applied to circumstances where the injury complained of, affected areas of the plaintiff's body which are remote from the area under immediate attention by the medical personnel during the procedure <sup>129</sup>.

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<sup>128</sup> Comment, "*Res Ipsa Loquitur: A case for Flexibility in Medical Malpractice*" 1970 *Wayne L Rev* 1136 1144. In this regard he says: "Usually plaintiff asserts superior access by the physician, but since *res ipsa loquitur* is viewed as a substitute for the allegation and proof of specific, proximate and negligent acts or omissions by the defendant-physician, it is reasonable to require the plaintiff to prove the defendant's superior access even though the patient may have suffered injuries that "speak for themselves"...The physician may have superior knowledge of medical matters generally, and may have voluntarily assumed a position of special confidence and trust to his patient; but it does not necessarily follow that the physician should be prevented from effectively asserting a good faith objection to the application of *res ipsa loquitur* where he has no greater access to explanatory evidence".

<sup>129</sup> *Ibid* 1145.

The final factual element concerns the state of consciousness or sensitivity of the plaintiff when the alleged negligent act occurred. Injury suffered in a state of unconsciousness or insensitivity induced by medical anaesthesia reduces the plaintiff's ability to produce specific evidence of negligence. He further submits that if there is an absence of the three elements discussed above, the doctrine of *res ipsa loquitur* should not find application even if the traditional requirements are met. In this regard he states:

“Although other policies favoring application of *res ipsa loquitur* in medical malpractice cases may outweigh each of these elements alone, it is suggested that in combination they present sufficient reason to alter this balance. Likewise, the courts could rely on the lack of any of the three to apply *res ipsa loquitur* where the traditional requirements are met. This would be consonant with the view of several commentators that application of *res ipsa loquitur* should not depend upon a wooden test, but rather in part upon the particular facts involved. The traditional requirements afford considerable subjective, factual analysis, and the need for an additional test to expand the analysis depends in part upon the practical effect of *res ipsa loquitur*”<sup>130</sup>

#### **4.12.3 RES IPSA LOQUITUR, COMMON KNOWLEDGE AND EXPERT MEDICAL OPINION**

Traditionally, expert medical evidence was required to prove negligence

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<sup>130</sup> Ibid 1146.

against medical defendants. The doctrine of *res ipsa loquitur*, when it finds application to medical negligence cases, allows juries to infer negligence from the circumstances surrounding the injury <sup>131</sup>. Eaton states that it is incongruous to allow a lay jury to infer a proposition which generally demands expert proof, but that the policies which underlie these seemingly inconsistent positions may be reconciled without any compromise to either position <sup>132</sup>.

It would seem that the modern trend is to allow both a *res ipsa loquitur* instruction and expert medical evidence in medical negligence cases <sup>133</sup>.

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<sup>131</sup> Eaton 1982 *Georgia L Rev* 33 42; De Lousanoff 38.

<sup>132</sup> Eaton 1982 *Georgia L Rev* 43.

<sup>133</sup> Ablin 1996 *Virginia L Rev* 327 328. In this regard she states: “thus, a judge’s use of a three-word Latin phrase to express the simple concept that certain accidents “speak for themselves” has engendered a much more expansive doctrine, one that has opened a “Pandora’s box of misunderstandings by the courts” (perhaps *because* it was first expressed in Latin). In particular, it has found its way in the field of medical malpractice, giving plaintiffs a powerful weapon with which to prevail in their negligence claims. The use of *res ipsa loquitur* in medical malpractice cases is particularly potent because of the special difficulties of establishing negligence in that context. Thus, as one judge has asserted, “[t]he ‘thing speaking for itself’ has taken on a life of its own multiplying in the field of medicine with the self assurance of a crusader”.

The common knowledge doctrine permits juries to evaluate the reasonableness of a medical defendant's conduct without the aid of expert testimony in cases where the alleged act or omission does not involve the exercise of medical skill or judgment and those cases where the common knowledge and experience of the jury allow them to determine the reasonableness of the medical care provided <sup>134</sup>. Joint application of the doctrine of common knowledge and *res ipsa loquitur* allows the jury to infer negligence from the injury purely on the basis of its common knowledge <sup>135</sup>.

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<sup>134</sup> Eaton 1982 *Georgia L Rev* 47 48-49. In this regard he states that: "There are also cases in which the jury is permitted to evaluate the defendant's exercise of medical skill and judgment without the benefit of expert evidence. These cases involve the common knowledge doctrine. The premise of the common knowledge doctrine is that the "facts, although connected with medicine, are so well known as not to require expert testimony to place them before the jury, or where the case concerns matters which juries must be credited with knowing by reason of common knowledge." The common knowledge doctrine has most frequently been applied in the so-called foreign-objects and remote-traumatic-injury cases. If the defendant surgeon failed to remove a sponge or other foreign object from the patient, a jury may find that the defendant was negligent even in the absence of expert testimony...The trend in some jurisdictions is to expand the types of cases suitable for treatment under the common knowledge doctrine. When this is done, the availability of *res ipsa loquitur* is correspondingly expanded".

<sup>135</sup> Dahlquist 1983 *Pacific L J* 133 141. See also Hirsh *et al* 1985 *Med Trial Tech Q* 410ff.



The expansion of the doctrine of *res ipsa loquitur* with regard to the fact that the plaintiff is permitted to rely on the doctrine and tender expert medical testimony with regard to both negligence and opine whether the type of accident was one which would ordinarily not occur in the absence of negligence, has met with both positive and negative responses from commentators<sup>136</sup>.

Ablin states that although some courts accept that a plaintiff may utilize expert opinion to persuade the jury that facts ‘speak for themselves’, this is not the case at all. She says that it is rather a case where the experts are speaking for the facts. The jury is then invited by the judge to find negligence by means of a *res ipsa loquitur* instruction. She submits that the doctrine is not only ill-suited for cases where expert evidence is required before the jury may make a negligence finding, but that it is as equally foreign to the jury as the original injury<sup>137</sup>.

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<sup>136</sup> See fn 49 supra.

<sup>137</sup> Ablin 1996 *Virginia L Rev* 347 348. A further aspect which she criticises is the perceived sympathy of the jury towards the plaintiff. In this regard she states: “By increasing the probability that the jury will reach a feelings-based result, instructing the jury on *res ipsa loquitur* also increases the risk of an erroneous negligence finding. This is due in part to the jury’s tendency to let its sympathy for the plaintiff influence its verdict more than it should. It is also due, however, to the fact that the jury is not relying on its own basis of common experience to infer negligence, as it should in *res ipsa* cases, but rather on the testimony of plaintiff’s medical experts that the defendant was negligent”.

#### 4.12.4 *RES IPSA LOQUITUR* AND THE ELEMENT OF CONTROL

The exclusive control requirement for the application of the doctrine of *res ipsa loquitur* presents difficulties for the plaintiff in cases where multiple defendants are involved, particularly in medical context. The majority of courts have refused to apply *res ipsa loquitur* where the plaintiff could only show that he had been injured by one or the other of a group of defendants unless vicarious liability or joint control could be shown. The departure from this majority view, initiated by the controversial **Ybarra** case has provoked a divergence of opinion from commentators.

McCoid says that in the **Ybarra** case the court required a retrial of an action to claim damages for an injury which the plaintiff allegedly suffered at the hands of several doctors and nurses while unconscious. At the retrial the defendants presented expert evidence to the effect that the injury to the defendant was more probably caused by infection than of traumatic origin. Apart from this apparent denial of negligence, each defendant testified to the fact that while he or she was present, nothing occurred which could have

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caused the injury. He states that the trial court apparently disbelieved the first explanation of the defendants and as to the second felt that the defendants may have honestly failed to appreciate what happened to the plaintiff during the course of the procedure. He submits that since the trial court sat as a trier of fact it is not clear whether it found as a matter of law that neither form of rebuttal was legally sound or that, as a matter of fact, neither explanation was believable <sup>138</sup>.

Giesen is of the opinion that **Ybarra** as far as the element of control is concerned has shifted the burden of proof to multiple defendants which he considers appropriate in the light of the responsibility for the plaintiff's safety undertaken by everyone concerned <sup>139</sup>.

Seavy on the other hand states that to extend the doctrine to a situation where a series of people are *seriatim* in control or in partial control of the plaintiff and where the injury could have been caused by any one of them unobserved by the others, is to use the doctrine to accomplish a result

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<sup>138</sup> McCoid 1955 *Stan L Rev* 496.

<sup>139</sup> Giesen 524.

without reference to the reasons for it or its limitations. He further opines that it is not equitable to impose liability upon a group of defendants where it is evident that the injury was not the result of group action and most members of the group were innocent of any wrongdoing <sup>140</sup>.

One commentator states the following with regard to the **Ybarra** case:

“The *Ybarra* doctrine represents willingness to impose liability on several innocent defendants in order to provide recovery for the injured patient. If the defendants, among themselves, can determine the person at fault, only that person will pay. Otherwise innocent parties may be required to contribute compensation for the wrong of another...It may be that patients injured during medical treatment should not go uncompensated. But compensation for these injuries should not be based on a system of arbitrary liability. If all such injuries are to be compensated, the states should legislatively impose a system of social insurance; if the fault concept of liability is to be preserved, the courts must be willing to limit recovery to cases where the patient can clearly prove that the physician was at fault” <sup>141</sup>.

#### 4.12.5 THE CONDITIONAL *RES IPSA LOQUITUR*

In terms of the conditional *res ipsa loquitur* the court employs an instruction

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<sup>140</sup> Seavy 1950 *Harv L Rev* 648. See also fn 59 supra.

<sup>141</sup> Comment 1966 *The Northwestern University L Rev* 874-875.

to the jury in terms of which it is first to determine if the facts justify the application of the doctrine of *res ipsa loquitur* to the case. If the jurors' conclusion is in the affirmative they are then instructed as to the procedural effect of the application of the doctrine. Eldridge submits that this application of the doctrine is unique in two ways. Firstly, it allows a jury to be instructed on the application of *res ipsa loquitur* even if proof of specific acts of negligence is present. Secondly, it allows the jury, and not the court, to determine whether the doctrine applies. In this regard he states that the probability element of the doctrine is based on either common knowledge of the community or expert testimony, and are questions of law. The theory of conditional *res ipsa loquitur* places these questions in the hands of the jury, contrary to the general rule<sup>142</sup>.

Trucco points out that the application of the conditional *res ipsa loquitur* in California has been limited to cases involving medical procedures that are within the common knowledge of the jury. Where complex medical issues are at stake the probabilities of negligence cannot be established solely by reference to the common knowledge of the jury. He states that the case of

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<sup>142</sup> Eldridge 1986 *Wake Forest L Rev* 537 550-551.

**Spidle v Steward** has the effect of allowing the application of an equivalent of a conditional *res ipsa loquitur* to litigation involving a complex medical procedure<sup>143</sup>. He says that the **Spidle** majority did not explicitly recognise the applicability of a conditional *res ipsa loquitur*, but by holding that evidence of the rarity of an occurrence together with specific acts of negligence, required submission of the probability element to the jury, had the effect of applying an equivalent of a conditional *res ipsa loquitur*.

He submits that by allowing the jury to determine the applicability of the doctrine prior to drawing an inference of negligence, provides no safeguards against the jury determining the ultimate issue of negligence without addressing the threshold issue of probability upon which an inference of negligence is contingent. He states further, that because **Spidle** substantially alleviates a plaintiff's burden of proof in medical negligence cases, the *onus* of proof is effectively placed on the defendant to conclusively prove absence of negligence. The ultimate effect of this alteration of the burden

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<sup>143</sup> Trucco 1981 *DePaul L Rev* 413; **Spidle v Steward** 79 Ill 2d 1 37 Ill Dec 326 402 NE2d 216 (1980).

of proof is to make medical practitioners insurers against bad results <sup>144</sup>.

#### 4.13 THE PROCEDURAL EFFECT OF THE DOCTRINE

After the question of applicability of the doctrine of *res ipsa loquitur* has been addressed, either by establishing the requirements for the invocation of the doctrine as a matter of law or under a conditional *res ipsa loquitur* instruction by the jury, the question as to whether the plaintiff will prevail in a medical negligence case is dependent on the procedural effect afforded to its invocation <sup>145</sup>. There is even less unanimity amongst commentators to its procedural effect than to its application <sup>146</sup>.

The majority of jurisdictions support the view that the doctrine raises only a permissible inference of negligence. In terms of this approach the jury is permitted but not compelled to draw on inference of negligence from the circumstances <sup>147</sup>.

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<sup>144</sup> Trucco 1981 *DePaul L Rev* 436; See also fn 61 **supra**.

<sup>145</sup> Prosser 1936 *Minn L Rev* 241 ff; Podell 1977 *Ins Council J* 644; De Lousanoff 51.

<sup>146</sup> De Lousanoff 51.

<sup>147</sup> In terms of this approach De Lousanoff 52 states that *res ipsa loquitur* is not considered a substantive rule of law but rather as a rule of evidence which permits the jury and not the court to infer negligence if the requirements of the doctrine are met.

The second approach entails the creation of a presumption which shifts the burden of going forward to the defendant. The effect of this approach is that it requires a directed verdict for the plaintiff unless the defendant introduces sufficient evidence to exculpate himself<sup>148</sup>.

The third view has the effect of not only creating a presumption but also shifts the burden of proof to the defendant who has to prove that he was in fact not negligent on a preponderance of the evidence<sup>149</sup>.

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<sup>148</sup> De Lousanoff 54.

<sup>149</sup> Ibid 56ff. Podell 1977 *Ins Council J* 645 expresses the following opinion with regard to the different approaches: "The policy considerations supporting the two minority positions include the defendant's greater access to the facts explaining the injury, the frequent unconsciousness of the plaintiff at the time of injury, the special relationship between physician and patient, and the alleged conspiracy of silence. These factors have given support to the view that it is more equitable and efficient to require the defendant to explain the injury than to require the plaintiff to prove that the injury resulted from negligence. While these policy considerations are persuasive, they may be sufficient to justify the application of *res ipsa loquitur* against multiple defendants in a medical malpractice action so as to enable the plaintiff to establish a *prima facie* case. Since the effect of the doctrine is commonly the same under either the inference or presumption view, the defendant will generally come forth with rebuttal evidence. The result satisfies the underlying goals of these basic policy considerations and sufficiently balances the inequities of proof in a medical malpractice case without deviating from traditional concepts of fault liability to shift the burden of proof to the defendant". See also De Lousanoff 56ff.



#### **4.14 THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL**

According to Podell <sup>150</sup> the evidence, including the inference of negligence will be weighed by the jury in circumstances where the defendant either offers no evidence in rebuttal or if the exculpatory evidence is less than equally probable than negligence. The evidence without the inference of negligence will be weighed by the jury as a factual question where the exculpatory evidence is equally probable with the inference of negligence.

The plaintiff is not required to reply to the evidence in rebuttal to reach the jury but if the exculpatory evidence is of such a nature that it establishes non-negligence conclusively the court will direct a verdict in the defendant's favour and thus withhold the case from the jury. In cases where the plaintiff's evidence is compelling the courts will under the inference approach, require the defendant to justify his actions to avoid a directed verdict. Where the plaintiff's evidence is of a conclusive nature so as to render the inference of negligence inescapable, the failure of the defendant

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<sup>150</sup> Podell *supra* 645ff.

to establish exculpatory evidence will have the same effect as where a defendant under the presumption approach, fails to go forward with the evidence because in both instances the defendant runs the risk of a directed verdict if he fails to offer any evidence.

She further opines that the courts have generally strictly construed the requirements for the application of the doctrine to medical negligence cases thereby enforcing plaintiffs to approximate a compelling level to satisfy the conditions precedent. This factor together with the fact that defendants usually offer evidence in rebuttal as far as medical negligence cases are concerned, support the contention that the procedural force under either the inference- or presumption approach is more often than not, identical <sup>151</sup>.

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<sup>151</sup> Podell 1977 *Ins Council Journal* 647. In summary she states as follows: "The effect of *res ipsa loquitur* in medical malpractice litigation does not guarantee the plaintiff a favourable verdict. Not only must the plaintiff satisfy strict threshold requirements in order to gain the benefit of the inference, but the inference so created can be overcome by the strength of the defendant's evidence or can be afforded whatever weight the jury chooses...These factors produce a result significantly distant from the popular notion that a plaintiff in a malpractice case need merely provide a showing of injury to recover under the doctrine".

#### 4.15 OVERVIEW OF LEGAL OPINION

Due to the complete lack of unanimity among academic commentators on the applicability of the doctrine of *res ipsa loquitur* to medical negligence cases in the USA, it is difficult not to associate oneself with the following sentiments expressed by Adamson in this regard:

“Since *res ipsa loquitur* is incapable of accurate definition, and no one can say when it is or is not applicable, and few can agree as to its exact effect when applicable, it would be presumptuous to attempt to create order out of chaos within the confines of this brief Article. Perhaps the best solution to the problem would be to abolish the whole doctrine (whatever the doctrine may be) and start anew, free from layers of associations which the years have heaped upon *res ipsa loquitur*. But the law does not discard a hallowed and handy doctrine merely because learned writers and the courts cannot agree. Besides, every lawyer, while unable to write a definite treatise on the subject nevertheless *feels* that he has some kind of subjective grasp of the matter so that he knows when *res ipsa loquitur* should be applicable although he cannot say why”<sup>152</sup>.

Adamson points out that a dilemma which has always existed in tort law to marry the concept that all worthy suitors will be successful and that all blameless defendants will be completely protected, also exists in medical negligence litigation. He states that the application of the doctrine of *res ipsa loquitur* to medical negligence cases weighs the scales heavily in favour of

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<sup>152</sup> Adamson 1962 *Minn L Rev* 1043-1044.

the patient-plaintiff. Application of the doctrine, he says, is tantamount to imposition of liability without fault and in practice it means that the doctor must conclusively vindicate himself or suffer the consequences no matter how blameless he may be or how ‘impossible’ it may be for him to ‘explain’. The jury is also usually sympathetic to the patient and has the final say<sup>153</sup>.

Rubsamen opines that the Supreme Court should make it clear that *res ipsa loquitur* is a doctrine of circumstantial evidence. The courts should be cautioned that where expert evidence gives rise to the doctrine, the strands of medical evidence must be separated and examined. Only where there is a statement that the nature of the injury infers negligence will the first requirement of *res ipsa loquitur* be met and this must be kept separate from the “standard of care” issue<sup>154</sup>.

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<sup>153</sup> Adamson 1962 *Minn L Rev* 1057.

<sup>154</sup> Rubsamen 1962 *Stan L Rev* 251 282. He opines that: “The most intangible aspect of the problem raised by *res ipsa loquitur* is possibly the most important. Few critical physicians would disagree on the underlying requirement for good medical practice – the doctor’s freedom to make choices with only medical considerations in mind. These choices are frequently difficult, and mistakes which do not constitute negligence may occasionally lead to serious disability or death...If the medical community develops the feeling that it is being subjected to unwarranted risks of legal liability, this harassment cannot help but interfere with medical decision making”.

He advocates the return of *res ipsa loquitur* to its original role of being an evidentiary device which is employed for the purpose of avoiding a nonsuit and permitting the jury to apply its common sense where common sense is called for. He states that “common-knowledge” *res ipsa* should be limited to situations which truly raise an inference of negligence for the layman. He concludes by saying that the increased interest of the medical profession to provide expert witness panels should alleviate the problem of raising expert *res ipsa loquitur* when appropriate <sup>155</sup>.

Trucco, in considering the conditional *res ipsa loquitur*, states that although the societal policy of compensating an injured patient is laudable, its foundation for assessing liability must rest on a reasonable basis in a system where liability is predicated on fault. He says that to hold a doctor liable for negligence without reference to inherent risks and probabilities of adverse results of complicated medical procedures, is the product of ‘an expedient judicial manipulation of *res ipsa loquitur* to achieve a desired result’. By allowing jury speculation on the issue of negligence without the safeguards embodied in the traditional doctrine, the distinction between liability based on fault and strict liability is to a great extent undermined <sup>156</sup>.

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<sup>155</sup> Rubsamen 1962 *Stan L Rev* 283.

<sup>156</sup> Trucco 1981 *De Paul L Rev* 439.

Ablin is likewise of the opinion that courts might be using the doctrine not because of its inherent worth but as a means of transforming the tort regime from a fault based system to one of strict liability. She says that *res ipsa loquitur*'s true raison d'être may be its use as a formula for relaxing the earlier rigidity of the logical pursuit of fault at a time when the importance of fault itself has been waning.

Ablin further submits that not only does the Latin tag add nothing to the proof which would exist without it but also that there has been no case where it has been anything but a 'hindrance'. She concludes that the time has perhaps come to consign the Latin tag to the legal dustbin as it seems that courts are only using the doctrine to achieve a result without reference to the reasons for it or to its limitations<sup>157</sup>.

On the other end of the scale commentators such as Harney opine that the doctrine of *res ipsa loquitur* is nowhere needed more than in the medical negligence action. He states that one of the most pervasive legal problems in cases of this nature is the issue of causation. Often the facts which reveal

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<sup>157</sup> Ablin 1996 *Virginia L Rev* 355.

professional negligence will not be sufficient to establish the requisite legal cause. He submits that the practice of medicine is in itself the application of an inexact science and the proving of medical negligence causing untoward results, is by necessity also inexact. The application of the doctrine to such cases facilitates proof of that nature <sup>158</sup>.

De Lousanoff suggests that the courts should formulate special rules and criteria for medical negligence cases to induce them to turn away from the misuse and confusion-causing extension of the doctrine of *res ipsa loquitur*. He says that policy considerations such as the defendants greater access to the facts explaining the injury, the unconsciousness of the patient at the time of the injury, the special fiduciary relationship between the doctor and patient and the conspiracy of silence, which led to the extension of the doctrine, would fully justify an exception from the normal principles of the burden of proof in the 'foreign object', and 'unrelated injury' cases or in an action against multiple defendants. In this regard he states:

“The shift of the burden of proof to the defendant(s), without referring to *res ipsa loquitur* at all, would be a clear solution which, in view to the other existing exceptions to the general

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<sup>158</sup> Harney 429-430.

principle that the burden of proof lies on the plaintiff, is by all means compatible with the traditional tort system based on fault liability. It would still mean a big step from there to strict liability or other compensation systems”<sup>159</sup>.

Podell is of the opinion that there seems to be undue concern with regard to the use of *res ipsa loquitur* in medical negligence cases. According to her the requirements for the application of the doctrine have been strictly controlled by the courts. Despite the plaintiff’s difficulties in obtaining expert evidence, the recognition that many medical matters do not fall beyond the knowledge of lay persons and the impossibility of proving specific acts of negligence because of the plaintiff’s unconscious state when the injury occurs, the courts have still not been willing to apply the doctrine beyond limited factual settings.

The defendant usually stands in a superior position to account for the cause of harm during treatment and assumes a professional role which charges him with constructive knowledge of the full course of medical proceedings. The inference of negligence created by the application of the doctrine of *res ipsa loquitur* may easily be destroyed because the defendant-doctor has greater access to the actual facts as well as to medical experts for the purpose of

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<sup>159</sup> De Lousanoff 58.



substantiating that the complications which arose did in fact ensue despite the exercise of due care. Should the evidence establish an equal probability of negligence or non-negligence the jury will consider the question without the inference and in this regard she says that the jury's perceived 'plaintiff favoritism', is a traditional notion which is no longer valid. In this regard Louisell and Williams state that in their experience, which includes interviews with experienced judges and counsel are indicative of the fact that a jury trial is now often thought to be more favourable to the defendant in the general run of negligence cases<sup>160</sup>.

She also criticises the view that extended discovery procedures makes reliance on the doctrine unnecessary as these procedures are mainly designed to compel disclosure after the action is instituted and consequently a plaintiff may not have sufficient information to frame a complaint without the use of the doctrine. Compared to other areas of negligence litigation the use of expert testimony to establish the applicability of *res ipsa loquitur* is in keeping and consistent with modern trends where the threshold

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<sup>160</sup> Louisell and Williams *Medical Malpractice* (1973) 453.

determination is outside the common knowledge standard. In this regard she also observes that the control element has been relaxed outside the area of medical negligence cases which provides for a more logical employment of the doctrine because modern professional responsibilities often substitute the right to control for actual control. She says that to impose liability on a medical practitioner who disclaims control or knowledge of what transpired while a patient is unconscious and who fails to establish proof of due care and skill, is consistent with the theories of vicarious liability under the universally accepted *respondeat superior*.

Another justification for the application for the doctrine of *res ipsa loquitur* is the special fiduciary relationship between the parties which demands that the doctor provides an explanation to the patient concerning the injury which occurred. She concludes by stating that the failure of the legislature to alleviate the plaintiff's difficulties in obtaining expert testimony provides additional justification for the continued application of the doctrine of *res ipsa loquitur* in medical negligence litigation <sup>161</sup>.

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<sup>161</sup> Podell 1977 *Ins Council J* 645-649.

## **4.16 SYNOPSIS**

### **4.16.1 INTRODUCTION**

As in the case of the South African and English legal systems certain well-established principles with regard to the application of the doctrine of *res ipsa loquitur* in general context as well as to medical negligence cases in particular, have emerged with regard to the following issues:

- 1.1 the requirements for the application of the doctrine;**
- 1.2 the nature of the doctrine;**
- 1.3 the effect of the doctrine on the *onus* of proof;**
- 1.4 the nature of the defendant's explanation in rebuttal.**

The relevant principles relating to each of these issues can be summarized as follows:

### **4.16.2 THE REQUIREMENTS FOR APPLICATION OF THE DOCTRINE**

#### **4.16.3 NEGLIGENCE**

1. The accident must be one which in the light of the ordinary experience

of the layman invites an inference that as a matter of common knowledge the defendant has been negligent <sup>162</sup>.

2. The evidence required in order for the doctrine to be invoked must be such that reasonable persons can say that it is more likely that there was negligence associated with the cause of the accident than that there was not <sup>163</sup>.
3. In medical context two rules effect the common knowledge requirement namely the 'calculated risk' and the 'bad result' rule, respectively <sup>164</sup>.
4. The 'common knowledge' requirement has been liberalised to the extent that there is a growing recognition that certain sophisticated medical matters fall within the common knowledge of laypersons. Some courts allow the plaintiff to both introduce evidence of specific acts of negligence and to rely on the doctrine of *res ipsa*

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<sup>162</sup> **Seneris v Haas supra 915; Frost v Des Moines Still College of Osteotomy and Surgery supra 306; Fehrman v Smirl supra 255.**

<sup>163</sup> **Marathon Oil v Sterner Tex supra 571; Markanian v Pagano supra 335; Smith v Little supra 907.**

<sup>164</sup> In terms of the 'calculated risk' rule the doctrine is not applied where the defendant can produce expert evidence or statistics showing that the accepted method of treatment he employed, involved substantial or material risks to the patient. The 'bad results' rule involves the principle that evidence of a bad result, without expert medical evidence, does not on its own constitute sufficient evidence to draw an inference of negligence. (**Engeling v Carlson supra 695; Farber v Olkon supra 525; Olson v Weitz supra 537; Robinson v Wirts supra 706; Rhodes v De Haan supra 1043; Terhune v Margaret Maternity Hosp supra 75**).

*loquitur*. In this regard the doctrine is liberalised to the extent that the plaintiff is in some jurisdictions permitted to rely on the doctrine and present expert medical testimony with regard to both negligence and opine whether the type of accident was one which would ordinarily not occur in the absence of negligence <sup>165</sup>.

5. Courts have also allowed the plaintiff not just to allow a nonsuit by applying the doctrine but also to request and receive a *res ipsa loquitur* jury instruction. In terms of this liberalization the plaintiff is able to avoid a nonsuit and invite the jury to draw an inference of negligence against the defendant via the *res ipsa* instruction <sup>166</sup>.

#### 4.16.4 CONTROL

1. The accident must be caused by an agency or instrumentality within the exclusive control of the defendant <sup>167</sup>.

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<sup>165</sup> **Seneris v Haas supra 915; Mayor v Dowsett supra 234; Harris v Cafritz Memorial Hospital supra 135; Perin v Hayne supra 609; Walker v Rumer supra 689; Bucklelew v Grossbard supra 1115; Parks v Perry supra 287.**

<sup>166</sup> Ablin 1996 *Ins Council J* 335.

<sup>167</sup> **Bjornson v Saccone supra 88.**

2. Some courts have adopted the approach that *res ipsa loquitur* requires nothing more than evidence from which it could be established that the event was of a kind which does not ordinarily occur in the absence of negligence, and that the negligence which caused the event was probably that of the defendant <sup>168</sup>.
3. Although the majority of jurisdictions support the view that the doctrine of *res ipsa loquitur* does not find application to multiple defendants <sup>169</sup> courts have applied the doctrine to multiple medical defendants who had concurrently exercised control over medical instrumentalities <sup>170</sup>.

#### 4.16.5 CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF

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<sup>168</sup> **Payless Discount Centers Inc v North Broadway Corp supra 22; Parillo v Giroux Co Inc supra 1313.**

<sup>169</sup> **Turner v North American Van Lines supra 384; Beakley v Houston Oil & Minerals Corp supra 396; Fireman's Fund American Insurance Companies v Knobbe supra 825.**

<sup>170</sup> **Ybarra v Spanguard supra 687; Oldis v La Societe Francaise de Bienfaisance Mutuelle supra 184; Sherman v Hartman supra 894; Frost v Des Moines Still College of Osteopathy and Surgery supra 306; Voss v Bridwell supra 955; Matlick v Long Island Jewish Hospital supra 631; Fogal v Gensee Hospital supra 552; Shields v King supra 922; Anderson v Somberg supra 366; Somerset v Hart supra 814; Kowalski v Voirs supra 397; Jones v Harrisburg Polyclinic Hospital supra 1134; Swan v Tygett supra 590; Schaffner v Cumberland County Hospital System Inc supra 579; Butti v Rollins supra 14.**

1. There must be an absence of any act on the part of the plaintiff which contributes to the occurrence in order that the plaintiff does not recover damages for injuries for which he himself is responsible <sup>171</sup>.
2. Where in medical context, the court finds that the plaintiff behaved in such a manner as to contribute to his own injury the doctrine of *res ipsa loquitur* is not applied against the parties who administered the treatment <sup>172</sup>.
3. The advent of comparative fault acts converts the plaintiff's contributory fault from the traditional barring of liability to one of reducing damages to the *pro rata* degree of fault of the plaintiff <sup>173</sup>.

#### **4.16.6 EVIDENCE MUST BE MORE ACCESSIBLE TO THE DEFENDANT**

1. This requirement cannot be regarded as indispensable and the underlying reason for it may be to give the doctrine a greater

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<sup>171</sup> **Dugas v Coca-Cola Bottling Co supra 1054; Brantley v Stewart Building & Hardware Supplies Inc supra 943; Emerick v Raleigh Hills Hospital - Newport Beach supra 92; Watzig v Tobin supra 651.**

<sup>172</sup> **Hornbeck v Homeopathic Hospital Asso supra 461; Kitto v Gilbert supra 544; Mayor v Dowsett supra 234; Holmes v Gamble supra 905; Emerick v Raleigh Hills Hospital - Newport Beach supra 92.**

<sup>173</sup> See fn 18 supra 178.

procedural effect. It has found limited application in medical context  
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#### **4.17 THE NATURE OF THE DOCTRINE**

Unless there are special circumstances applicable or a special relationship between the plaintiff and the defendant, the majority of courts in the USA regard the doctrine of *res ipsa loquitur* as a form of circumstantial evidence which permits but does not compel an inference of negligence against the defendant <sup>175</sup>.

#### **4.18 ONUS OF PROOF**

1. There are three divergent approaches which the courts have adopted in the USA with regard to the procedural effect of the doctrine on the *onus* of proof.
2. In terms of the first approach the jury is permitted but not compelled to infer negligence from the plaintiff's case and has the effect of

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<sup>174</sup> **Bucklelew v Grossbard supra 1157; Strick v Strutsman supra 148; Holman v Reliance Insurance Companies supra 1298; Faby v Air France supra 1018; Seneris v Haas supra 915.**

<sup>175</sup> **Sweeny v Erving supra 815; National Tea Co v Gaylord Discount Department Stores Inc supra 345; Watzig v Tobin supra 651.**



satisfying the burden which rests on the plaintiff to introduce evidence upon which reasonable men may find in his favour so as to avoid a nonsuit or a dismissal since there is sufficient evidence to go to the jury. The adoption of this approach has the effect that the burden of proof does not shift to the defendant nor an obligation to move forward with the evidence, except in the limited sense that if the defendant fails to tender any evidence he runs the risk that the jury may find against him. The strength of the inference to be drawn will as a general proposition depend on the specific circumstances of the case <sup>176</sup>.

2. The presumption approach entitles the jury to infer negligence against the defendant and in the absence of exculpatory evidence by the defendant the court will require the jury to do so, also entitling plaintiff to a directed verdict. The burden of going forward with the evidence is placed on the defendant but this does not mean that the defendant is required to tender evidence of a greater weight than the plaintiff. If the scales are evenly balanced when all the evidence is in, the verdict must be for the defendant <sup>177</sup>.

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<sup>176</sup> **Buckelew v Grossbard supra 1157; Wilson v United States supra 728; Thomkins v Northwestern Union Trust Co supra 402; Rathvon v Pacific Airlines supra 122; Estate of Neal v Friendship Manor Nursing Home supra 594; Watzig v Tobin supra 651.**

<sup>177</sup> **Newing v Cheatham supra 33; Hyder v Weilbaecher supra 426; Hammond v Scot Lad Foods Inc supra 362.**

3. In terms of the third approach the *onus* of proof is shifted to the defendant who is required to prove on the preponderance of the evidence that the injury was not suffered as a result of his negligence<sup>178</sup>.
4. Where a defendant is able to introduce some evidence which tends to show specific acts of negligence on the part of the defendant but does not provide a full and complete explanation of the occurrence it does not destroy the inferences which are consistent with the evidence and consequently does not deprive the plaintiff of the benefit of *res ipsa loquitur*<sup>179</sup>.
5. Some jurisdictions permit a so-called conditional *res ipsa loquitur* in circumstances where it is problematic to establish whether the doctrinal requirements have been met and where ‘reasonable minds’ may differ on the issue. In such circumstances the jury is instructed to determine whether the facts justify the application of the doctrine to the case and if the jurors’ conclusion is in the affirmative they are then instructed as to the procedural effect of the application of the doctrine<sup>180</sup>.

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<sup>178</sup> **Weiss v Axler supra 88; Johnson v Coca-Cola Bottling Co supra 537; Homes v Gamble supra 905; Toussant v Guice supra 850.**

<sup>179</sup> **Mobil Chemical Co v Bell supra 245; Kranda v Houser-Norborg Medical Corp supra 1024.**

<sup>180</sup> **Seneris v Haas supra 915; Quintal v Laurel Grove Hosp supra 161; Tomei v Henning supra 633; Clark v Gibbons supra 125; Schnear v Boldrey supra 478.**

#### **4.19 THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL**

1. With the exception of a minority of jurisdictions it is generally accepted that the invocation of the doctrine does not cast the burden of proof on the defendant and on this basis the defendant is not obliged to tender any evidence and if he does, it need only permit the jury to say that it is as probable that he was not negligent than that he was <sup>181</sup>.
2. The inference of negligence must be balanced against the defendant's evidence and the jury is not obliged to draw the inference which only has weight while reasonable persons are able to derive it from facts in evidence <sup>182</sup>.
3. The defendant must tender evidence which will neutralize any reasonable inference of negligence or contradict it to such an extent that reasonable persons can no longer accept it, in order to get a directed verdict in his favour. The nature of the defendant's evidence to neutralize the inference is dependent on the strength of the inference and if a defendant convincingly shows that the accident was caused by some outside agency over which the defendant had

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<sup>181</sup> **Volnault v O'Rourke supra 535; Micek v Weaver-Jackson Co supra 768; Nopson v Wockner supra 1022.**

<sup>182</sup> **Prooth v Wallsh supra 666.**

no control, that the occurrence commonly occurs without negligence on the part of anyone or that it could not have been avoided by the exercise of all reasonable care, he is entitled to a directed verdict in his favour <sup>183</sup>.

4. Where the defendant's evidence is to the effect that he exercised all reasonable care, it may not be sufficient to attract a directed verdict in his favour unless the proof of proper care is so overwhelming that it destroys the inference created by the invocation of the doctrine <sup>184</sup>.

#### **4.20 STATUTORY REGULATION OF THE DOCTRINE**

1. State legislatures have the authority to regulate the application of the doctrine. A number of these statutes limit or have abolished the doctrine in medical negligence cases <sup>185</sup>.

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<sup>183</sup> **Oliver v Union Transfer Co supra 478; Lopes v Narragansett Electric Co supra 55; Wagner v Coca-Cola Bottling Co supra 807; American Village Corp v Springfield Lumber and Building Supply supra 891; Town of Reasnor v Pyland Construction Co supra 269; Strick v Stutsman supra 184.**

<sup>184</sup> **Prooth v Wallsh supra 666.**

<sup>185</sup> See fn 65-67.

#### 4.21 CONCLUSION

Case law suggests that the doctrine of *res ipsa loquitur* is applied to a wide variety of circumstances in medical context. The development of the doctrine in this field has been controversial and commentators argue that its application has not facilitated a more precise judgment but rather has led to legal uncertainties.

While the medical profession advocates the barring of the application of the doctrine to medical negligence cases completely and while a too liberal application of the doctrine may make such a view logically defensible and practically warranted, it is submitted that doctors should be treated like any other litigants, no better and no worse.

Extended discovery procedures, a growing willingness of the medical profession to provide expert medical opinion in medical negligence cases and a jury's perceived plaintiff favouritism are some policy considerations which do not outweigh the need to apply the doctrine in limited but meritorious medical negligence cases. It is important however that the

doctrine should be applied evenly and consistently so as to ensure that liability is not imposed in an arbitrary way.